IN THE

# Supreme Court of the United States

No. 78-6621

GILBERT FRANKLIN BECK,

*Petitioner,*

v.

STATE OF ALABAMA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

## BRIEF OF PETITIONER

*Of Counsel:*

JOHN A. HERFORT
JAY WISHINGRAD
Kaye, Scholer, Fierman, Hays & Handler
425 Park Avenue
New York, New York 10022
Tel. (212) 759-8400

JOHN L. CARROLL
Southern Poverty Law Center
1001 South Hull Street
Montgomery, Alabama 36104
Tel. (205) 264-0286

DAVID KLINGSBERG
425 Park Avenue
New York, New York 10022
Tel. (212) 759-8400
*Attorney for Petitioner*

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

*Cases:*

*Statutes:*







*Other Authorities:*

IN THE

# Supreme Court of the United States

---

**No. 78-6621**

---

GILBERT FRANKLIN BECK,

*Petitioner,*

v.

STATE OF ALABAMA,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

---

## BRIEF OF PETITIONER

---

## OPINIONS BELOW

The opinion of the Supreme Court of Alabama (A. 53-54), reported at 365 So.2d 1006 (Ala. 1978), including dissents by two Justices, and the opinion of the Court of Criminal Appeals of Alabama (A. 17-52), reported at 365 So.2d 983 (Ala. Crim. App. 1978), are reproduced in the Joint Appendix previously filed with this Court.

## JURISDICTION

The jurisdiction of this court is based on 28 U.S.C. §1257(3) (1970), the petitioner having asserted below and in this Court that his rights secured by the Constitution of the United States were violated by the procedures pursuant to which he was convicted of a capital offense and sentenced to death.

The judgment and opinion of the Supreme Court of Alabama was entered on December 8, 1978. On January 8, 1979, the Supreme Court of Alabama set March 30, 1979 as the date for petitioner's electrocution, and on March 21, 1979, stayed the execution until further order of that Court. This Court granted a writ of certiorari on October 9, 1979.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of Alabama law: Section 13-11-1 through Section 13-11-9, Code of Alabama (1975); Section 13-1-73, Code of Alabama (1975); Section 15-17-1, Code of Alabama (1975).

These constitutional and statutory provisions are set forth in Appendix A to this brief.



## QUESTION PRESENTED

By order of this Court dated October 9, 1979, the petition for a writ of certiorari was granted limited to the following question presented by the Court: "May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict?"

## STATEMENT OF THE CASE

Petitioner Gilbert Franklin Beck was indicted by an Etowah County, Alabama, grand jury that charged he committed a robbery on November 8, 1976, during the course of which he intentionally killed Mr. Roy Malone, the victim of the robbery.[1] Petitioner was indicted pursuant to Section 13-11-2(a)(2) of the Alabama death penalty statute,[2] which specifies, among others, the following capital offense: "Robbery or attempts thereof when the victim is intentionally killed by the defendant."

---

[1] The indictment is set forth at R.821 and is quoted in large part in the opinion below of the Alabama Court of Criminal Appeals. Beck v. State, 365 So.2d 985, 987 (Ala. Crim. App. 1978).

[2] Alabama's death penalty statute is set forth at Section 13-11-1 through Section 13-11-9, Code of Alabama (1975).

## I.

## THE EVIDENCE ON PETITIONER'S GUILT OR INNOCENCE

Petitioner denied in his trial testimony that he killed Malone (A. 58). Other than petitioner, who took the stand in his own defense, no eyewitnesses testified at the trial concerning the killing of Malone. Petitioner admitted that on November 8, 1976 he went with Roy Clements to Malone's house to carry out a robbery. R. 585-86.[3] Petitioner further testified that Clements killed Malone. Although Clements was the only other eyewitness to the killing, the State did not call him as a trial witness.[4]

According to petitioner, he and Roy Clements arrived at Malone's house at 2:30 P.M. that day. R.587.[5] At

[3] In his so-called "Voluntary Statement (Under Arrest)," dated November 9, 1976, and furnished in the early hours of the day following the commission of the alleged crime, petitioner also denied that he killed Malone, and admitted committing the robbery. A.22-24. At the sentencing hearing before the court, petitioner reiterated that he did not kill Malone and that he had no idea before the robbery that the victim might be killed. R.779.

[4] Clements was also tried, convicted and sentenced to death for his involvement in the robbery-killing. However, his conviction and sentence have been reversed on state-law grounds. Clements v. State, 370 So.2d 723 (Ala. 1979).

[5] Earlier that day, according to petitioner, he and Roy Clements went to Malone's house and engaged Malone in conversation in his yard about materials for building chicken pens. R.585. According to petitioner's "Voluntary Statement," petitioner admitted that the purpose of this trip was to rob Malone. R.1113-16. Shortly thereafter, three men arrived at Malone's house by car, at which time petitioner and Roy Clements left and returned to Beck's trailer home several miles away. R.586.



that time, petitioner and Roy Clements entered the house and found Malone in the kitchen. R.589.

Petitioner further testified that he contemplated that no physical harm would be inflicted on Malone. R.588. Indeed, according to the petitioner, he and his accomplice, Roy Clements, had agreed beforehand that they would only tie up Malone, an elderly retired veterinarian, in the course of the robbery. A. 56. Pursuant to their plan, petitioner, after conversing with Malone for a period of time, received a head-nod signal from Clements, following which petitioner seized Malone from behind and sought to tie him up with rope. A. 56-57. At this point, petitioner testified, Roy Clements came up to Malone and unexpectedly "whacked his neck on the right side of the neck." R.592. Petitioner immediately jumped up and protested Roy Clements' assault on Malone: "I jumped up and I said, 'Oh, my God, Roy . . . Why did you do that?' " R.592. Petitioner also testified that he did not have a knife in his possession and never assaulted Malone with any weapon. A. 58.

Following Clements' knife assault on Malone, petitioner testified that he left Malone's house without taking anything and got into his truck. A. 57-58. Clements emerged from Malone's house "two to three minutes" later with a lady's purse and a wallet in his hand. A. 58. During a lengthy cross-examination by the prosecuting attorney, petitioner maintained that he did not kill Malone, never contemplated that Malone might be killed or that a knife would be used during the robbery, and that he took nothing from Malone's house. R.608-39, 653-54.

Petitioner further testified that after he and Clements

left Malone's house they returned to Beck's trailer and awaited the return of Mary Ann Thrasher (the woman Beck was living with in the trailer) and Deborah Clements (Clements' wife and Thrasher's daughter). It was determined that the robbery netted some $73. Petitioner then burned his clothes, which had been spotted by Malone's blood. R.599. Later that afternoon, Clements, with petitioner, Deborah Clements and Thrasher in the car, drove to a mountain adjacent to a nearby highway, at which point the wallet and billfold were thrown away, R.601-02. Petitioner testified that, on the way back from the mountain, Roy Clements and Thrasher decided to return to Malone's house in order to steal the large sums of cash which Thrasher believed were still in the house. R.602.[6] Because police vehicles were already at the Malone house, Clements drove past without stopping. R.603. A few hours after the robbery, petitioner was arrested by local police authorities and has been incarcerated ever since.

The crucial fact-issue in the case was whether the State proved the vital element of the capital offense, *i.e.*, whether petitioner intentionally killed Malone.[7] The State's case against petitioner was based entirely on

---

[6] According to petitioner, Thrasher had repeatedly proposed the robbery of Malone, a person she stated had secreted large sums of cash in his house. R.582-84.

[7] Under the Alabama death penalty statute, it was not sufficient merely to prove that petitioner participated in a robbery where the victim was killed. The latter would constitute, at most, felony murder, a non-capital offense in Alabama. Thus, §13-11-1(b) of the Alabama death penalty statute provides:

> "Evidence of intent under this section shall not be supplied by the felony-murder doctrine."



circumstantial evidence, much of which was inconsistent with other testimony, including both the State's and petitioner's witnesses.

The State's principal witness on the issue of whether Beck intended to kill the victim of the robbery was Thrasher. Thrasher testified that she had known petitioner for about two years and that prior to November 8, 1976 she had been living with him in his trailer home. R.383-84. Thrasher further testified that around noon on November 8, while petitioner was in his trailer, he was sharpening a pocket knife "on a whet rock." R.387-88.

Deborah Clements, however, who (with her husband) was also present in petitioner's trailer prior to the robbery of Malone, testified that she did not see petitioner sharpen any knife. R.490. Petitioner also denied that he had any type of knife or a "whet rock" in his possession that day. A. 58. Furthermore, according to the trial testimony of Elizabeth Lane (Beck's sister), Thrasher made statements outside the courtroom implicating herself as a conspirator in the scheme to rob Malone. Lane also testified that Thrasher had stated that she did not believe that petitioner killed Malone. R.543. Petitioner's brother, William T. Beck, testified that "Mary Ann [Thrasher] made the statement that she was going to tell some lies also. That if anything was–that putting it off on her, trying to say that she was the instigator, then she was going to do some lying." R.562. Moreover, Thomas Earl James, a first cousin of Thrasher, testified that her general reputation in the community for truth and veracity was bad. R.659.

The testimony of the State's expert medical witnesses was also contradictory and, therefore, provided no support to the State's contention that petitioner intentionally killed Malone. Thus, Bill Braff, the Coroner for Etowah County, testified that it was his opinion that the fatal knife wound was on the left side of Malone's neck. R.237. Van Pruett, Jr., a State Toxicologist, on the other hand, testified that Malone was wounded on the right side of the neck. R.230.[8] Furthermore, Pruett conceded that he could not determine whether the person who had inflicted this wound on the victim was standing in front of the victim or behind him. R.259.

## II.

## THE TRIAL COURT'S CHARGE TO THE JURY

The Alabama death penalty statute precludes a lesser-offense instruction in a capital case by providing that the 14 listed offenses which Alabama defines as capital "shall not include any lesser offenses."

[8]This confusion about the precise nature and location of the fatal wound may have been caused by the failure of the police to adequately preserve the security and integrity of the deceased body, which was removed to a funeral home before an autopsy was performed. *See* R.234.



§13-11-2(a).[9] In accordance with this statute, the trial judge's charge did not permit the jury to convict petitioner on any lesser-included offense such as first-degree murder (which includes the offense of felony murder under Alabama law) or robbery, all of which are non-capital offenses. *See* Point IV, *infra.* Instead, in accordance with the Alabama death penalty statute, the trial judge told the jury that it could return the following verdicts: acquittal, not guilty by reason of insanity or conviction of the capital crime of robbery and intentional killing. R.743, 746-47.

The trial judge also charged that "if [petitioner] is acquitted in this case he can never be tried for anything that he ever did to Roy Malone" (R.743), and that "if the jury finds the defendant not guilty the Defendant must be discharged." *Ibid.* By virtue of these instructions, the jury was foreclosed from finding petitioner guilty of any crime other than the capital crime of robbery-intentional killing. The jury was told that if they acquitted petitioner, he could never be convicted and punished for robbing Malone.

[9]It is firmly established that the Alabama stature precludes lesser-offense instructions in capital cases. Thus, §13-11-2(a) of the law provides in pertinent part: "If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses . . . *and which offenses so charged . . . shall not include any lesser offenses . . .*" (emphasis added). As stated by Chief Justice Torbert in his concurring and dissenting opinion in Jacobs v. State, 361 So.2d 640, 646 (Ala. 1979), *cert. denied*, 439 U.S. 1122 (1979), "the capital jury in Alabama cannot convict a defendant for a lesser-included offense." *See also* Evans v. Birton, 472 F. Supp. 707, 714 (S.D. Ala. 1979) ("Under the Alabama statute, the trial jury is specifically precluded from considering any lesser offenses that might be revealed by the evidence").

The trial judge's instruction did not provide the jury with clear guidance on the critical issue of whether petitioner had the requisite intent to kill. Indeed, the instruction indicated that defendant could be found guilty merely on the basis of his presence at the scene and his admission that he went with Clements to Malone's house with the intent to carry out a robbery. Thus, the trial judge gave the jury the following aider-and-abetter instruction:

> "If a person aids or abets another in the commission of a crime he is as guilty as the party who commits the crime and is thus aided and abetted by him. The words 'aid and abet' as I have used them in this charge comprehend all assistance rendered by act, words, encouragement, support or presence, actual or constructive to render assistance should it become necessary." R.734-35.[10]

The trial judge also failed to focus on the issue of intent-to-kill when he instructed the jury that defendant could be found guilty as a mere conspirator:

> "In general, a conspiracy comes into being when two or more persons enter upon a unlawful enterprise with a common purpose to aid, assist, advise or encourage each other in whatever may grow out of the enterprise upon which they enter. Each is responsible for everything which may consequently and proximately result from such unlawful purpose, whether specifically contemplated or not and whether actually perpeprated

[10]Petitioner's trial counsel excepted to this part of the trial judge's charge. A. 11-12.



> by all or less than all of the conspriators." R.736.[11]

Furthermore, the trial judge defined for the jury a "capital felony" as one "committed while the Defendant was engaged or was an accomplice in the commission of or attempt to commit or flight after committing or attempting to commit rape, robbery, burglary or kidnapping for ransom." R.744.

On the issue of sentence, the trial judge instructed the jury that its deliberations were to be governed by §13-11-2(a) of the Alabama death penalty statute, which the court paraphrased as follows: "If the jury finds the Defendant guilty they shall fix the punishment of death . . ." R.742. He reiterated that if the jury found petitioner guilty, its form of verdict should be "guilty . . . and we fix the punishment at death." R.746-47.[12]

## III.

## THE SENTENCING HEARING BEFORE THE COURT

Following the jury's guilty verdict and sentence of death, the jury was discharged and a hearing was scheduled, as required by §§13-11-3, 13-11-4, 13-11-6, 13-11-7 of the Alabama death penalty statute, for the

[11]The Alabama death penalty law does not include the crime of conspiracy (which in Alabama is a non-capital offense, Alabama Code §13-9-20 (1975)). Thus, petitioner's trial counsel took an exception to this instruction (R.748), that if the jury believed that petitioner was a mere conspirator, he could be found guilty of the capital crime, even though the killing was committed by someone else.

[12]§13-11-2(a) in pertinent part states: "If the jury finds the defendant guilty, it shall fix the punishment at death. . . ."

trial judge to consider "aggravating" and "mitigating" circumstances and to decide whether to accept the death sentence as fixed by the jury. R.758.

At the sentencing hearing before the trial judge, petitioner testified, as he had at trial, that he did not kill Malone, and that he had no idea beforehand that the victim of the robbery was in any danger of being killed. R.779. Petitioner also testified that he had never before in his life been charged with a criminal offense. R.775. Petitioner also stated that he served in the Marines and received an honorable discharge. R.775.

Following oral argument, the trial judge found aggravating circumstances pursuant to the Alabama death penalty statute, including the following which corresponds to §13-11-6(4) of Alabama's law: "That a capital felony was committed while the Defendant was engaged or was an accomplice in the commission of a robbery." This finding was mandated by the jury's finding that petitioner was guilty of robbery-intentional killing.[13]

[13]The trial judge also found, pursuant to §13-11-6(8), that "The capital felony was especially heinous, atrocious, or cruel," and, pursuant to §13-11-6(6), that "the capital felony was committed for pecuniary gain." R.813. The trial judge also stated at this point that "two or more human beings [were] intentionally killed by the defendant by one or a series of acts." R.813. This statement is inexplicable, since petitioner was tried only for the murder of Malone and no evidence was introduced implicating him in any other death. When the trial judge found the felony "especially heinous, atrocious, or cruel," he provided no reasons why petitioner's crime differed from other robbery-intentional killings, even though the statute's use of the word "especially" necessitates such an explanation. The fourth aggravating circumstance, set forth in §13-11-6(5), found by the trial judge was "[t]hat the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. . . ." R.812.



After listing the aggravating circumstances, the trial judge found a single mitigating circumstance under §13-11-7(1) of the law: "the Defendant has no significant history of prior criminal activities." R.813. The trial judge, however, gave no weight to testimony concerning petitioner's exemplary employment history (*see* R.566-76), to the fact that he had served honorably in the U.S. Marines (R.775), to the fact that petitioner's two requests to take a lie-detector test had been refused (R.781), or to testimony concerning petitioner's psychological difficulties (R.782, 798-800), or to petitioner's unrefuted testimony that he did not kill Malone, did not intend to do so, never anticipated that Malone would be killed, and immediately protested his accomplice's lethal assault when it occurred.[14] The trial judge made no written findings and simply confirmed the jury's death sentence.

Petitioner's unsuccessful appeals in Alabama's appellate courts followed and a writ of certiorari was granted by this Court on October 9, 1979.

## HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner's contention that Alabama's procedures for trial and sentence in capital cases violate the United

[14]One of the "mitigating circumstances" under Alabama's law is the following: "The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor." §13-11-7(4). The trial judge did not even mention the possibility that this "circumstance" might be applicable.

States Constitution was raised before trial in a motion to quash the indictment which the trial judge denied. A. 55; R.39-45,105. In the course of oral argument on that motion, petitioner's trial counsel specifically objected to Alabama's preclusion of a lesser-offense instruction, noting that the Alabama law "says to the jury that you have got a choice of two things, either you can sentence him to die or you can acquit him." R.40. At the close of his argument, petitioner's counsel stated: "I would ask your Honor to seriously consider the aspects of where the jury can only find his guilt and sentence him to die . . . The jury can only find him guilty of a capital crime and sentence him to die or they can acquit him." R.44-45. Petitioner's trial counsel also took exceptions to the form of the verdict stated by the trial judge (R.748), and to the charge on the issues of conspiracy and aiding and abetting. R.748-49.

After his conviction and sentence of death, petitioner pressed his federal constitutional objections, including his objection to the preclusion of a lesser-offense verdict, before the Alabama Court of Criminal Appeals, which, in a lengthy opinion (A. 17-52), rejected them on the merits and specifically upheld the feature of Alabama's law pursuant to which the "trial jury cannot be instructed on lesser included offenses." A. 39, 40. In his petition to the Alabama Supreme Court, petitioner reiterated his federal constitutional contentions, which that Court rejected in a two-page opinion on the authority of a prior decision.

## SUMMARY OF ARGUMENT

Since this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), over 30 states have enacted new



capital punishment statutes in an attempt to preserve the death penalty and, simultaneously, eliminate the defects of unbridled sentencing discretion stressed in the *Furman* opinions. Of those states, Alabama was the only one to institute a capital punishment procedure which precluded capital juries from rendering a verdict that the defendant was guilty of a lesser, non-capital crime. Alabama's law, moreover, is contrary to its own practice in non-capital cases and to the practice of every other state, the federal courts and Great Britain in non-capital and capital cases.

The essence of petitioner's argument is that by forcing capital juries to render all-or-nothing verdicts in cases (like petitioner's) where the evidence points to a defendant's guilt of a serious non-capital crime (here, felony murder or robbery),[15] Alabama's law subjects capital juries to unwarranted pressure to return a verdict of guilt on the capital charge. Thus, the law creates such a substantial risk of impermissibly influenced fact-finding that it violates the Due Process Clause and the Cruel and Unusual Punishment Clause and cannot be squared with numerous rulings of this Court. *E.g., In re Winship*, 397 U.S. 358 (1970); *Estelle v. Williams*, 425 U.S. 501 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976). In *Keeble v. United States*, 412 U.S. 205 (1973), the Court specifically recognized that this risk was of constitutional dimensions in a non-capital case. Given the irrevocable nature of the death penalty, the consequences of imposing that risk in a capital case are infinitely more troublesome.

[15]Point IV establishes that but for the Alabama statute, the evidence would have entitled petitioner to have the jury consider a lesser-offense verdict.

Moreover, the distortion of the fact-finding process affects the sentencing hearing as well as the guilt-finding process because a finding of guilt on the capital charge in petitioner's case *automatically* meant that there was an "aggravating circumstance" sufficient under Alabama law to support a death sentence. As this Court stated in *Gregg v. Georgia*, 428 U.S. 153, 199-200, n.50 (1976), criminal procedures which, among other things, preclude lesser-offense verdicts, "would be totally alien to our notions of criminal justice" and "would be unconstitutional." The singularity of Alabama's law and the threat it poses to the confidence and reliability of guilt and sentencing findings are sufficient to invalidate Alabama's law under the principles of this Court's decisions discussed in Point I, *infra* (relating to Due Process) and Point II, *infra* (relating to the Cruel and Unusual Punishment Clause).

Alabama's law also violates the Equal Protection Clause. *See* Point III, *infra*. The law singles out the precise category of defendants who are most in need of special safeguards for the deprivation of a well-established procedural protection. Since Alabama continues to provide the lesser-offense option in non-capital cases, its decision to eliminate lesser-offense verdicts in capital cases is not based on a considered view that the lesser-offense procedure is generally unsound. The only apparent basis for the discrimination in the Alabama statutes is an erroneous reading of this Court's *Furman* opinions. This is an insufficient basis for sustaining a classification with such potentially devastating consequences.



## ARGUMENT

## I.

**BY NOT PERMITTING THE JURY TO CONSIDER A VERDICT OF A GUILT OF A LESSER-INCLUDED NON-CAPITAL OFFENSE, ALABAMA'S DEATH PENALTY STATUTE CREATED A SUBSTANTIAL RISK OF UNRELIABLE FACT-FINDING ON THE ISSUES OF GUILT AND SENTENCE AND THUS VIOLATED PETITIONER'S RIGHTS UNDER THE DUE PROCESS CLAUSE.**

### Introduction

The fundamental defect of Alabama's death penalty statute is that it substantially increases the risk of fact-finding error in capital cases on the issues of guilt and sentence. There is no escaping the conclusion that where the jury is precluded from a finding of guilt on a lesser offense, its deliberations are likely to be impermissibly influenced by the prospect that a defendant, who is plainly guilty of a grave non-capital offense, will be totally freed by a not guilty verdict on the offense charged. In these circumstances, the jury is under pressure to render a guilty verdict even though the defendant may be guilty only of a lesser crime.

This case squarely presents the "difficult constitutional questions" under the Due Process Clause which this Court in *Keeble v. United States, supra*, 412 U.S. 205, 213 (1973), stated are raised by absolute statutory preclusion of a lesser-offense instruction. Because this is a capital case where a finding of guilt was sufficient by

itself to support a death sentence, these constitutional questions are even more serious than in *Keeble*, a non-capital case.

The jury found that petitioner was guilty of the capital crime of "robbery . . . when the victim is intentionally killed by the defendant." §13-11-2(a)(2). This finding necessarily infected the subsequent sentencing proceeding where the trial judge was required to find "aggravating" and "mitigating" circumstances in order to determine whether to impose the death sentence. One of the "aggravating circumstances" under Alabama's law is the following: "The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit . . . robbery." §13-11-6(4). The jury's finding of petitioner's guilt on the charge of robbery-intentional murder necessitated a finding of this aggravating circumstance, as the trial judge found. R.812-13[16] Since a finding of a single aggravating circumstance under Alabama's law is all that is required by the statute,

[16]The Alabama statute places the trial judge under intolerable pressure at sentencing in another way. The jury verdict against petitioner was mandatorily accompanied by a death sentence by the jury (without consideration of mitigating circumstances), as required by §13-11-2(a). This initial sentence by the jury was followed by a hearing on aggravating and mitigating circumstances after which the judge had to decide whether to "refuse to accept the death penalty as fixed by the jury." §13-11-4. This sentencing scheme places such obvious pressure on the judge, who must decide to override the jury's formal initial sentence, that it underscores the manner in which the jury's initial verdict infects the ultimate decision for life or death. Jacobs v. State, 361 So.2d 640, 649-50 (Ala. 1978) (Jones, J. dissenting), *cert. denied*, 439 U.S. 1122 (1979).



§13-11-4(1), the finding of guilt greatly enhanced the chances that petitioner would be sentenced to death.

It is well-established that "procedural due process rules are shaped by the risk of error inherent in the truth-finding process." *Carey v. Piphus*, 435 U.S. 247, 259 (1978), quoting from *Matthews v. Eldridge*, 424 U.S. 319, 344 (1976). Where the stakes are life or death, there is a greater constitutional necessity for procedures which minimize the risk of error than in a non-capital case where defendant's liberty is at issue. *E.g., Powell v. Alabama*, 287 U.S. 45, 71 (1932); *Lockett v. Ohio*, 438 U.S. 586, 605 & n.13 (1978); *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). In short, since Alabama's unique law deprives the jury of the opportunity to find a defendant guilty of the precise offense it may well believe that he committed under the facts, it is inconsistent with principles of fundamental procedural fairness.

The history of lesser-offense instructions and its virtually unanimous use support the conclusion that Alabama's law violates the Due Process Clause. Permitting convictions on offenses less than those charged is a practice that dates back beyond the eighteenth century, was widely utilized in the nineteenth century, and is today employed in the federal courts, Great Britain, Canada and every state in the Union. Even Alabama provided for lesser-offense instructions in capital and non-capital cases alike since at least the mid-nineteenth century. Only in 1975 did Alabama decide to preclude such instructions in capital cases, apparently on the basis of an erroneous interpretation of this Court's decision in *Furman*. This statutory innovation was not only a reversal of Alabama's long-standing practice of permitting lesser-offense verdicts in capital cases, but is

contrary to Alabama's continuing practice of permitting such verdicts in non-capital cases. Thus, Alabama's capital offense law, enacted in 1975, is inconsistent with the entire history and practice at common law which accords defendants this vital safeguard.

**A. This Court's decision in *Keeble v. United States* and numerous supporting precedents compel the conclusion that Alabama's death penalty statute is contrary to the Due Process Clause.**

In *Keeble v. United States, supra,* this Court confronted the question whether the Major Crimes Act of 1885, 18 U.S.C. §§1153, 3242, should be construed to prohibit a jury instruction on a lesser-included offense where the lesser offense was not one of the crimes enumerated in the Act. Petitioner in *Keeble* was convicted of assault to commit serious bodily injury on an Indian reservation, a federal crime under the Major Crimes Act. The trial court refused to instruct the jury on the lesser-included offense of simple assault. The Court, in an opinion by Mr. Justice Brennan for a six-Justice majority, held that the Major Crimes Act could not be construed to prohibit a verdict on a lesser offense even where the lesser offense was not an offense enumerated in the Act. 412 U.S. 212-214.[17]

[17]Mr. Justice Brennan's opinion was joined by Chief Justice Burger and Justices Douglas, White, Marshall and Blackmun. None of the three dissenters–Justics Stewart, Powell and Rehnquist–disputed the majority's analysis of the protection accorded by the option of a lesser-offense verdict to defendant's interest in reliable jury fact-finding. Rather, the dissent was predicated on the view that the lesser offense of simple assault was not a federal crime and, thus, to permit the jury to convict on such lesser charge would exceed the federal court's jurisdiction. 412 U.S. at 215-17 (Stewart, J., dissenting).



The Court's opinion in *Keeble* carefully explained the vital protection afforded by a lesser-offense instruction, stating that a basic function of the instruction was to avoid the substantial risk of convicting a defendant of a higher crime than actually was committed:

> "True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction–in this context or any other–precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory." 412 U.S. at 212

Then, the Court went on to describe the reason why deprivation of a lesser-offense instruction was so clearly detrimental to the defendant's interests in reliable jury fact-finding:

> "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction. In the case before us, for example, an intent to commit serious bodily injury is a necessary element of the crime with which petitioner was charged, but not of the crime of simple assault. Since the nature of petitioner's intent was very much in dispute at trial, the jury could rationally have convicted him of simple assault if that option has been presented. But the jury was presented with only two options: convicting the defendant of assault with intent to commit great bodily injury, or acquitting him outright. We cannot say that the availability of a third option–convicting the defendant of simple assault could not have resulted in a different verdict." 412 U.S. at 212-13.

By construing the Act to allow a lesser-offense verdict, the Court expressly recognized the difficult Due Process question that would otherwise be presented:

> "Indeed, while we have never explicitly held that the Due Process Clause of the Fifth Amendment guarantees the right of a defendant to have the jury instructed on a lesser-included offense, it is nevertheless clear that a construction of the Major Crimes Act to preclude such an instruction would raise difficult constitutional questions. In view of our interpretation of the Act, those are questions that we need not face." 412 U.S. at 213 (footnote omitted).

Applied to petitioner's case, the Court's analysis in *Keeble* is compelling on the constitutional issue. As in *Keeble*, the evidence that petitioner was guilty of the serious offense of robbery was extremely strong. There was also evidence supporting a verdict of guilt on the non-capital crime of first-degree murder, which, under Alabama law, does not require that the defendant intended the victim's death. *See* Point IV, *infra*. But on the key issue of whether petitioner was also guilty of intentionally killing the victim, the issue was, in the words of *Keeble*, "very much in dispute." Petitioner not only denied that he killed the victim, he also testified that he had no idea that the victim might be killed and that he immediately protested the killing and left the scene when the accomplice unexpectedly carried out his deadly knife assault on the victim. In light of petitioner's admitted participation in a serious non-capital crime (robbery) which, even petitioner acknowledged, culminated in the deadly knifing of the victim, the trial jury was faced with an intolerable and unrealistic all-or-nothing choice on the issue of guilt.



The jury's dilemma was accentuated by the trial judge's instruction that in the event of acquittal, petitioner "can never be tried for anything that he ever did to Roy Malone [the decedent-victim]" and that if the jury found petitioner not guilty, he would be "discharged."

In sum, Alabama's law has the inescapable and impermissible effect of diverting the jury from focusing on the strong possibility that petitioner was guilty only of a non-capital crime (*e.g.*, first-degree robbery) and not guilty of the capital crime charged. Instead, the statute and the trial judge's charge focused the jury's attention on the appalling prospect that if it acquitted him of the crime charged, petitioner would be totally freed, even though he was plainly guilty of an extremely serious crime.

It is no answer to this argument that Alabama's capital juries will consider the grave consequences of a capital-crime conviction in reaching a verdict under Alabama's law.[18] This does not reduce to acceptable proportions the "substantial risk" noted in *Keeble* that a jury will opt for conviction where the only alternative is acquittal and where the jury may well have convicted him only of a lesser offense had that option been available. As stated by Justice Shores of Alabama's Supreme Court in her dissent from a recent decision upholding the constitutionality of Alabama's law:

> "[M]ost, if not all, jurors at this point in our history perhaps equally abhor setting free defendant where the evidence establishes his guilt of a serious crime. We have no way of knowing what influence either of these factors have on a jury's deliberation, and which of these unappealing alternatives a

[18] *See* Evans v. Birton, *supra*, 472 F. Supp. at 714-15.

jury opts for in a particular case is a matter of purest conjecture. We cannot know that one outweighs the other. Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them. The increasing crime rate in this country is a source of concern to all Americans. To expect a jury to ignore this reality and to find a defendant innocent and thereby set him free when the evidence establishes beyond doubt that he is guilty of some violent crime requires of our juries clinical detachment from the reality of human experience; and, in my judgment, renders the statute under which this defendant was convicted unconstitutional." *Jacobs v. State*, 361 So.2d 640, 651-52 (Ala. 1978) (Shores, J. dissenting), *cert. denied*, 439 U.S. 1122 (1979).

The operation of Alabama's law produced just the result feared by Justice Shores. According to the Alabama Attorney General's Office, of the first 50 defendants who pleaded not guilty and were tried under the law, 48 were convicted; of the first 45 sentenced after trial, 37 received death sentences.[19] This astonishing record of prosecutorial success—a 96% conviction rate in contested cases and an 82% death sentence rate—is sharply at variance with this nation's historical experience. *See Woodson v. North Carolina, supra*, 428 U.S. at 295, n.31 ("Data compiled on discretionary jury sentencing of persons convicted of capital murder reveal that the penalty of death is generally imposed in less than 20% of the cases").

Even before *Keeble*, this Court recognized the fundamental importance of the lesser-offense option in

[19]Respondent's Brief in Opposition to a Petition for a Writ of Certiorari, Jacobs v. Alabama (U.S. October Term, 1978, No. 78-5696), at 10, 35.



capital cases. *E.g., Stevenson v. United States*, 162 U.S. 313, 323 (1896) (reversing a conviction for murder and sentence of death on the ground that the trial judge's erroneous refusal to give an instruction on the lesser offense of manslaughter curtailed the power of the jury to "determine from all the evidence . . . whether the crime was murder or manslaughter");[20] *Hopt v. Utah*, 110 U.S. 574, 582-83 (1884) (reversing territorial court conviction for first-degree murder and sentence of death on the ground that certain comments in the trial judge's instructions were likely to influence the jury to make a finding of first-degree murder and to ignore an instruction on the lesser offense of second-degree murder). *See also Wallace v. United States*, 162 U.S. 466, 475 (1896) ("Necessarily it must frequently happen that particular circumstances qualify the character of the offense [charged], and it is thoroughly settled that it is for the jury to determine what effect shall be given to circumstances having that tendency whenever made to

[20]This Court cited *Stevenson* with approval in *Keeble*, 412 U.S. at 208.

[21]*Wallace*, which reversed a murder conviction and sentence of death, did not directly involve the lesser-offense instruction question, but instead, the question of whether the defendant should have been permitted to introduce evidence tending to show that he was guilty, at most, of the lesser charge of manslaughter. Citing *Stevenson*, the Court held that the exclusion of such evidence was fundamental error. 162 U.S. at 475-76. Thus, *Wallace*, *Hopt* and *Stevenson* stand for the proposition that trial courts must not only give lesser-offense instructions where supported by the evidence, but may not vitiate the effectiveness of such instructions by evidentiary rulings or comments suggesting that the jury should ignore the lesser-offense option.

appear in the evidence").[21] These cases are compelling support for a holding that Alabama's law imposes such undue constraints on the jury's ability to make an accurate and impartial finding on the issue of guilt that it is inconsistent with the Due Process Clause.[22]

[22]These cases also support a holding that Alabama's law deprived petitioner of his Sixth Amendment right to a trial "by an impartial jury," a safeguard applicable in state proceedings pursuant to the Due Process Clause of the Fourteenth Amendment. *E.g.*, Witherspoon v. Illinois, 391 U.S. 510, 518 (1968). It is well-established that the need for impartiality must be safeguarded from influences which may tend to undercut the jury's ability to "render a verdict based on the evidence presented in court." Irvin v. Dowd, 366 U.S. 717, 723 (1961). *Accord*, Turner v. Louisiana, 379 U.S. 466, 471-74 (1965). Alabama's law creates a substantial risk of undermining the jury's impartiality by injecting into its deliberations the consideration that even if the defendant is plainly guilty of a serious intermediate offense, he must be freed if acquitted of the capital offense. This choice is plainly at odds with the jury's customary ability to exercise "common-sense judgment." Duncan v. Louisiana, 391 U.S. 145, 156 (1968). *Accord*, Frank v. Mangum, 237 U.S. 309, 349 (1915) (Holmes, J., dissenting) ("Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere"), cited with approval in *Turner, supra*, 379 U.S. at 472. Because Alabama's law creates a grave risk that the jury's verdict on a capital charge will not be impartially based on solely the evidence, but instead will be pressured by the consequences of acquittal where the defendant is plainly guilty only of an intermediate offense, it also violates the Sixth Amendment.



**B. Alabama's preclusion of lesser-offense verdicts subverts a capital defendant's presumption of innocence by creating an unacceptable risk of injecting impermissible factors into the jury's considerations.**

The all-or-nothing choice of verdicts which Alabama's law gives capital juries necessarily subverts a capital defendant's presumption of innocence and the requirement that he be found guilty beyond a reasonable doubt, all of which are of constitutional dimension.

Thus, in *In re Winship*, 397 U.S. 358 (1970), the Court held that the beyond-reasonable-doubt standard itself was constitutionally required to "provide concrete substance for the presumption of innocence," to minimize "doubt whether innocent men are being condemned," and in order to establish "confidence" that a jury's finding of guilt has been made with "utmost certainty." *Id.* at 363, 364. As the Court emphasized, "the function of legal process is to minimize the risk of erroneous decisions." *Addington v. Texas*, 99 S.Ct. 1804, 1809 (1979).[23] *See also Speiser v. Randall*, 357 U.S. 513, 525-26 (1958).

The considerations set forth in *Winship* and *Addington* underscore the need for lesser-offense instructions in capital cases, particularly where, as here, there is strong evidence that the defendant is guilty only of a serious intermediate crime. As *Keeble* expressly recognized, there is a "substantial risk" that foreclosure of a

[23]In *Addington*, the Court held that the Due Process Clause required that the states adopt a standard of proof in civil commitment cases no weaker than "clear and convincing" evidence. 99 S.Ct. at 1813.

lesser-offense instruction may induce fact-finding error on the part of even the most conscientious juror. *Keeble* also recognized that this danger is especially acute where the nature of defendant's "intent" is the key issue in dispute, as is the case here. In this setting, to confront the jury with a choice of extremes—acquittal or conviction of a capital crime—is an invitation for even the most conscientious juries to render uncertain, emotion-laden verdicts lacking in confidence and pregnant with doubt.

Since the *Winship* ruling, this Court has made it clear that in order to ensure fair and accurate fact-finding by juries, more than a beyond-a-reasonable-doubt instruction is often necessary to comply with the Due Process principles underlying the *Winship* ruling. Thus, in *Estelle v. Williams*, 425 U.S. 501, 503 (1976), the Court stated that the Due Process Clause requires courts to "be alert to factors that may undermine the fairness of the fact-finding process" and "must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." On the basis of "reason, principle, and common human experience," as well as the *Winship* ruling, *Estelle* held that requiring a criminal defendant over his objection to appear before the jury in prison garb was so likely to "affect a juror's judgment" that "an unacceptable risk is presented of impermissible factors coming into play." 425 U.S. at 504-05.

Similarly, this Court recently held that whether a person is guilty of the crime charged must be "determined *solely* on the basis of evidence introduced at



trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978) (emphasis added), *citing Estelle v. Williams, supra.* Where there is a "genuine danger that the jury would convict petitioner on the basis of . . . extraneous considerations," failure to provide safeguards to minimize that danger violates the Due Process Clause. *Taylor v. Kentucky, supra,* 436 U.S. at 488. *Accord, Cool v. United States,* 409 U.S. 100 (1972) (per curiam) (due process violated by instruction that accomplice's testimony in favor of defendant should not even be "considered" unless the jury first believed it beyond a reasonable doubt); *Mullaney v. Wilbur,* 421 U.S. 684 (1975).

Alabama's statutory preclusion of lesser-offense verdicts in capital cases poses a threat to the fairness of the fact-finding process at least as serious as the practices at issue in *Estelle* and *Taylor.* Where the defendant is plainly guilty of a serious non-capital offense but no such finding is allowed, the prospect of acquittal is such an omnipresent cloud over the jury's deliberations that even the most conscientious jury is likely to find that conviction on the capital charge is the only reasonable alternative. In such a situation, with the jury's attention diverted to the possibility of freedom for a defendant clearly guilty of a serious crime, there is a "genuine danger" of conviction on the basis of "extraneous considerations" rather than on the "evidence." At the very least, by pressuring the jury to choose among extremes, Alabama's law erects an "artificial barrier" to fair fact-finding in capital cases. *Cool*

*v. United States, supra,* 409 U.S. at 104.[24]

The lower federal courts have recognized that preclusion of a lesser-offense instruction, where otherwise appropriate, jeopardizes defendant's fundamental rights to fair jury fact-finding. *E.g., Joe v. United States,* 510 F.2d 1038, 1042 (10th Cir. 1975) (holding *Keeble* should be applied in a §2255 collateral proceeding to require a new trial because deprivation of a lesser-offense instruction "affected a right which *Keeble* recognized as fundamental against the background of

[24]This Court's decision in Jackson v. Denno, 378 U.S. 368 (1964) provides additional support for a holding that Alabama's law is invalid. In that case, the Court held that requiring the jury at the same time it considered the question of guilt or innocence to determine whether a defendant's confession was voluntary as a prerequisite for giving evidentiary weight to the confession violated the Due Process Clause. The Court stressed that "the evidence given the jury *inevitably injects irrelevant and impermissible considerations* of truthfulness of the confession into the assessment of voluntariness," 378 U.S. at 386 (emphasis added), and noted that since "a trustworthy confession must also be voluntary if it is to be used at all, generates natural and potent pressure to find it voluntary. Otherwise the guilty defendant goes free." *Id.* at 382. Similarly, Alabama's law, which in effect requires the jury to ignore the probability that defendant is guilty only of a serious non-capital crime, injects the "irrelevant and impermissible considerations" of freeing such a defendant into the central question of whether the evidence demonstrates that he is guilty beyond a reasonable doubt of the capital crime charged. In such cirumstances, the " 'practical and human limitations of the jury system,' *Bruton v. United States*, [391 U.S. 123, 135 (1968)], override the theoretically sound premise that a jury will follow the trial court's instructions." Parker v. Randolph, 99 S.Ct. 2132, 2140 (1979).



the Due Process Clause").[25] The same is true of state courts' decisions which recognize that the lesser-offense option is a fundamental constitutional right.[26]

[25]*See also* United States v. Comer, 421 F.2d 1149, 1153-54 (D.C. Cir. 1970) (reversing conviction for failure to give lesser-offense instruction on the ground that such an instruction would ensure that the jury would not return a verdict "in disregard of all the proof"); United States v. Tsanas, 572 F.2d 340, 346 (2d Cir.), *cert. denied*, 435 U.S. 995 (1978) ("the court should give the form of [lesser-offense] instruction which the defendant reasonably elects. It is his liberty that is at stake, and the worst that can happen to the Government under less rigorous instruction is his readier conviction for a lesser rather than a greater crime"); United States ex rel. Powell v. Pennsylvania, 294 F. Supp. 849, 852 (E.D. Pa. 1968), *appeal dismissed*, 425 F.2d 267 (3d Cir. 1970) (failure to give lesser-offense instruction, where otherwise appropriate, constitutes fundamental error requiring federal habeas corpus relief). *Accord*, United States ex rel. Matthews v. Johnson, 503 F.2d 339, 346 (3d Cir. 1974), *cert. denied sub nom.* Cuyler v. Matthews, 420 U.S. 952 (1975) ("We believe that the safeguards of due process will be satisfied only when all defendants in Pennsylvania murder trials are given the same opportunity, upon request duly made, to have a jury return a verdict of voluntary mansalughter as well as first and second degree murder").

[26]*E.g.*, People v. Modesto, 59 Cal.2d 722, 31 Cal. Rptr. 225, 382 P.2d 33, 38 (1963), *overruled on other grounds*, People v. Sedeno, 10 Cal.3d 703, 112 Cal. Rptr. 1, 518 P.2d 913 (1974) (Traynor, J.) (denial of lesser-offense instruction where such instruction is supported by "any evidence" violated defendant's "fundamental" and "constitutional" rights); *see also* Commonwealth v. Garcia, 378 A.2d 1199, 1203 (Pa. 1977) ("Allowing the jury to decide the case without adequate instruction as to the permissible [lesser offense] verdict . . . denies the jury information essential to a fair determination of the case," undercuts the *Winship* ruling, and is required "in order to avoid the possibility that the jury will erroneously convict the defendant of [a greater offense] when only [a lesser offense] has been proven").

Recently, a lower court has held that the constitutional principles underlying *Winship* are violated by refusal of a jury instruction on defenses that are supported by some evidence and by law. *Zemina v. Solem*, 438 F. Supp. 455, 469-70 (D.S.D. 1977), *aff'd per curiam*, 573 F.2d 1027 (8th Cir. 1978). Since a lesser-offense instruction provides much the same function, its availability may "raise a reasonable doubt in the jurors' minds" on the offense charged. *Ibid.* The reasoning in *Zemina* strongly militates against the validity of Alabama's law.[27]

The fact that a defendant's life is at stake means that there is an even greater necessity than ~~in capital cases~~ in non-capital cases (such as *Keeble*) for avoiding the substantial risks of erroneous conviction by requiring such a jury charge. This Court has consistently ruled that the necessity for a particular procedural safeguard varies with the nature of the deprivation faced by the defendant. *E.g., Speiser v. Randall, supra*, 357 U.S. at 520-21 ("the more important the rights at stake the more important must be the procedural safeguards

[27]The Alabama rule is also in effect an irrebuttable presumption against a finding of guilt on a lesser-included offense. This Court has frequently invalidated irrebuttable factual presumptions in cases involving fundamental rights. *E.g.*, Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1973); Leary v. United States, 395 U.S. 6 (1969); Carrington v. Rash, 380 U.S. 89 (1965). Such presumptions of fact must be based on at least a "rational connection" to proven facts which give rise to the presumption. Leary v. United States, *supra*, 395 U.S. at 36. There is absolutely no factual basis for conclusively presuming, as Alabama capital juries must, that capital defendants may not be guilty only of a lesser offense.



surrounding those rights"); *In re Winship, supra*, 397 U.S. at 370 (Harlan, J. concurring) (the decision as to whether the Due Process Clause requires a particular safeguard must "reflect a very fundamental assessment of the comparative social costs of erroneous factual determinations"); *Mullaney v. Wilbur, supra*, 421 U.S. at 698-701.

Particularly where a defendant's life, as opposed to simply his liberty, is in the balance, this Court has consistently held that procedural safeguards which might not be constitutionally required in non-capital cases are necessary. *E.g., Gregg v. Georgia*, 428 U.S. 153, 187 (1976) ("When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed"); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (because of the qualitative difference between capital and non-capital cases, there "is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case"); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.").

This rule has been held to apply as strongly to the process for determining guilt in capital cases as it does to sentencing. As the Court held in *Powell v. Alabama*, 287 U.S. 45, 71 (1932):

> "[t]he necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. Whether this

> would be so in other criminal prosecutions, or under other circumstances, we need not determine. All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and he is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."

*Accord, Reid v. Covert,* 354 U.S. 1, 77 (1957) (Harlan, J., concurring) ("I do not concede that whatever [trial] process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case"); *id.* at 45-46 (Frankfurter, J., concurring).

In sum, the Due Process Clause does not necessarily require a uniform rule relating to lesser-offense instructions for capital and non-capital cases. The Court need only decide that because of capital defendants' overwhelming interest in reliable fact-finding, because of the life-or-death choice at stake, and because of the grave public interest in avoiding an erroneous and irrevocable capital conviction and execution, Alabama's law should be invalidated.

### C. The Alabama statute's singular departure from long-established procedural practice in the United States and England offends the principle of fundamental fairness embodied in the Due Process Clause.

In determining whether the presence or absence of a particular procedural rule offends the Due Process



Clause, this Court has traditionally relied on several sources in order to determine whether the Constitution's "fundamental fairness" standard has been met. Thus, this Court has relied heavily on "history" in order to determine whether a given procedure is "fundamental to our system of justice." *Duncan v. Louisiana,* 391 U.S. 145, 153 (1968). *See also Mullaney v. Wilbur, supra,* 421 U.S. at 692-96; *In re Winship, supra,* 397 U.S. at 361. It has also relied on the extent of "adherence" to the practice in "common-law jurisdictions," *ibid.,* including the practice of the states and the federal courts (*e.g., Sandstrom v. Montana,* 99 S.Ct. 2450, 2454 & n.3 (1979)), and common-law jurisdictions outside the United States such as England. *See, e.g., Malinski v. New York,* 324 U.S. 401, 417 (1945) (Frankfurter, J.) (the Due Process Clause requires this Court to follow "those canons of decency and fairness which express the notions of justice of English-speaking peoples"). Under these standards, there are compelling grounds to conclude that allowing a lesser-offense conviction, given its history and widespread use, reflects "a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana, supra,* 391 U.S. at 155. At least in a capital case, this Court should hold that absolute preclusion of that option violates the Due Process Clause.

The practice of every state in the Union (including Alabama), the federal courts, Great Britain and Canada has been to make the lesser-offense option available to juries. At present, the lesser-offense option is available in federal criminal trials pursuant to Rule 31(c), Fed. R. Crim. Proc. Every state provides criminal defendants

with an opportunity to seek a lesser-offense instruction in felony cases.[28] Other than Alabama, none of the more than 30 states which reenacted death penalty statutes after *Furman* took the step of precluding lesser-offense verdicts in capital cases;[29] capital juries in each of those states except Alabama are not precluded from considering lesser-offense verdicts.

The lesser-included-offense doctrine has long been an integral part of the criminal justice systems of both the United States and England. As early as 1554, it was established that English juries were permitted in capital cases involving a charge of murder to return a verdict of manslaughter. *Salisbury's Case*, 1 Plow. 101 (1554); *accord, MacKalley's Case*, 9 Co. Rep. 65 67b (1611).[30] By the early nineteenth century, the option of convicting a defendant on a lesser-included offense was well

[28]The state statutes and applicable cases interpreting those statutes are set forth in Appendix B to this brief.

[29]The states other than Alabama which have death penalty statutes are listed, along with citations to their capital punishment statutes, in Appendix C to this brief.

[30]Moreover, according to Blackstone, even in Gothic and Roman law there were recognized degrees of guilt by which the seriousness of offenses and their punishment was determined. 2*Blackstone's Commentaries*, p. 1587 (Lewis ed. 1898). And, according to Halsbury, at common law, juries were permitted to "convict of a cognate offense of the same character but of a less aggravated nature if the words of the indictment are wide enough to cover such an offence." 9 *Halsury's Laws of England*, p. 175 (2d ed.).



established in non-capital cases.[31]

[31]*E.g.*, Rex v. Withal and Overend, 1 Leach 88 (1772) (sustaining a conviction for the lesser offense of stealing where the defendant was charged with the offense of stealing *and* breaking and entering); Rex v. Hunt, 2 Camp. 583 (1811) (sustaining a conviction for the lesser offense of publishing a libel where the defendant was charged with composing, printing, and publishing a libel); M. Hale, *Historia Placitorum Coronae*, 302 (1778) ("the jury may find . . . the defendant guilty of part, and not guilty of the rest . . ."); J. J. Chitty, *Criminal Law* 250 (London ed. 1841) ("the jury may frequently find the prisoner guilty only of a minor offense included in the charge, or a part of the offenses there stated"); T. Starkie, *Treatise on Criminal Pleading*, 379-80 (1824 ed.) ("So in general where, from the evidence, it appears that the defendant has not been guilty to the extent of the charge specified in the indictment or the information, he may be found guilty as far as the evidence warrants, and be acquitted as to the residue. . . . The same principle applies where the description of the offence laid in any count of an indictment, includes that of a more general and less aggravated offence; then . . . the defendant may be found guilty of the more general and be acquitted of the more aggravated offence"). *See also* M. Hale, *Pleas of the Crown*, 267 (1716); 2 Hawkins, *Pleas of the Crown*, 623 (1788).

For American cases discussing the early English practice, *see* Commonwealth v. Jones, 319 A.2d 142, 144-45 (Pa. 1974); *cert. denied*, 419 U.S. 1000 (1974); Brown v. State, 206 So.2d 377, 380 (Fla. 1968).

Modern British practice retains the lesser-offense option as a matter of statutory law.[32] In cases involving an indictment for murder, including felony murder, §6(2) of the United Kingdom's Criminal Law Act of 1967 provides for convictions on lesser offenses such as manslaughter or another lesser felony.[33]

Similarly, in Canada the lesser-offense alternative is provided by statute. Thus, Section 589 of the Criminal Code of Canada not only provides for jury considera-

---

[32]Thus, in cases involving neither murder nor treason, section 6(3) of the Criminal Law Act of 1967 provides:

"Where, on a person's trial on indictment for any offence except treason or murder the jury find him not guilty of the offence specifically charged on the indictment but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence or of any offence of which he could not be found guilty on an indictment specifically charging that other offence."

[33]§6(2) of the Criminal Law Act of 1967 provides:

"On an indictment for murder a person found not guilty of murder may be found guilty–

(a) Of manslaughter, or of causing grievious bodily harm with intent to do so; or

(b) of any offence of which he may be found guilty under an enactment specifically so providing, or under section 4(2) of this Act; or

(c) of an attempt to commit murder, or of an attempt to commit any other offence of which he might be found guilty;

but may not be found guilty of any offence not included above."



tion of lesser offenses in non-capital cases,[34] but "for greater certainty" it has a special statutory provision providing for lesser-offense verdicts in capital cases.[35]

### D. The historical background of lesser-included-offense instructions in the United States.

The option of lesser-offense verdicts in the United States dates back to the eighteenth century. Thus, as early as 1794, Pennsylvania passed a statute requiring juries in murder cases to "ascertain in their verdict, whether it be murder of the first or second degree." Pa. Laws 1794, c. 2766, Section II. Only if the jury found the defendant guilty of murder in the first degree would the death penalty be imposed. *Id.*, Section I. As

---

[34]Section 589(1) of the Criminal Code of Canada provides:

"A count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count includes the commission of another offence, whether punishable by indictment or on summary conviction, the accused may be convicted

(a) of an offence so included that is proved, nothwithstanding that the whole offence that is charged is not proved, or

(b) of an attempt to commit an offence so included."

[35]Thus, Section 589(2) of the Criminal Code of Canada provides:

"For greater certainty and without limiting the generality of subsection (1), where a count charges capital murder and the evidence does not prove capital murder, but proves non-capital murder, the jury may find the accused nonguilty of capital murder or an attempt to commit non-capital murder, as the case may be."

the Court stated in *McGautha v. California*, 402 U.S. 183, 198 (1971), the purpose of allowing the jury the option of finding defendants guilty of second-degree murder was to "reduce the rigors" of "the common-law rule imposing a mandatory death sentence on all convicted murderers." In *Woodson*, the Court noted that following Pennsylvania's enactment, "[o]ther jurisdictions, including Virginia and Ohio, soon enacted similar measures, and within a generation the practice spread to most of the States." *Woodson v. North Carolina, supra*, 428 U.S. at 290.[36]

By the latter part of the nineteenth century, the lesser-included-offense doctrine was well established in the United States in capital and non-capital cases. As stated by one noted commentator of the time: "Where offenses are included within one another . . . a party indicted for any one of them may be convicted of any lower one." 1 Bishop, *Commentaries on the Criminal Law*, §795 at 469 (5th ed. 1872). *Accord, State v. Coy*, 2 Aikens (Vt.) 181, 182 (Sup. Ct. 1827); *Johnson v. State*, 14 Ga. 55, 59 (Sup. Ct. 1853); *Hardy v. Commonwealth*, 58 Va. 592, 598 (Ct. App. 1867).[37]

[36]In *Keeble*, this Court also noted that the "lesser included offense developed at common law to assist the prosecution in cases where the evidence failed to establish some element of the offense originally charged." 412 U.S. at 208.

[37]*See* W. Clark, *Handbook of Criminal Procedure*, 403 (1918) ("If the whole of the offense charged is not proved, but so much of it as to constitute a substantive offense is proved, the defendant may be acquitted of the offense charged, and convicted of the offense proved, provided, at common law, each offense is either a felony or a misdemeanor. In most of our states, either by statute or independently of any statute, on indictment for felony, there may be a conviction of a misdemeanor included therein.").



Alabama's own experience beginning in the mid-nineteenth century appears typical. Thus, since 1852 the Code of Alabama has provided:

> "When an indictment charges an offense of which there are different degrees, the jury may find the defendant not guilty . . . of any offense which is necessarily included in that with which he is charged, whether it be a felony or a misdemeanor."[38]

Under this statute, the Alabama Supreme Court has held that a "defendant who is accused of the greater offense is entitled to have the court charge on the lesser offenses included in the indictment, if there is any reasonable theory from the evidence which would support the position." *Fulghum v. State*, 277 So.2d 886, 890, 291 Ala. 71 (1973). Even where the evidence supporting the lesser offense is "weak, insufficient, or

[38]Code of Alabama (1852) §647; Code of Alabama (1867) §4199; Code of Alabama (1876) §4904; Code of Alabama (1886) §4482; Code of Alabama (1896) §5306; Code of Alabama (1907) §7315; Code of Alabama (1923) §8697; Code of Alabama (1940) T.15 §323; Code of Alabama (1975) §15-17-1. There was a predecessor lesser-offense statute enacted by Alabama in 1841 which provided: "Upon an indictment for any offence consisting of different degrees, as prescribed by law, the jury may find the accused not guilty of the offence in the degree charged in the indictment, and may find him guilty of any degree of such offence inferior to that charged on the indictment, or of an attempt to commit such an offence; and whenever a person is indicted for an offence embracing one or more offences of a lesser character, if the guilt of the accused is not made out as charged, it shall be competent for the jury, if the proof authorizes it, to find the accused guilty of the lesser offence, whether a felony or a misdemeanor." Alabama Penal Code of 1841, §12, Clay's Digest 439-40.

doubtful in credibility," Alabama case law interpreting this statute requires an instruction on that offense to be given. *Davis v. State*, 19 So.2d 356, 358 (Ct. App. Ala. 1944). *Accord, Weldon v. State*, 50 Ala. App. 477, 280 So.2d 183, 184 (Ct. App. Ala. 1973). ("No matter how slight the evidence may be supporting the defense offered by the appellant [defendant], he is entitled to have a correct statement of law given to the jury by the court and the determination of its weight is for the jury".)

In cases where the charge was murder, Alabama, as far back as the mid-nineteenth century, has mandated that the jury consider whether the defendant was guilty of first-degree murder (punishable by death until this Court's decision in *Furman*) or second-degree murder (a non-capital offense). Thus, the Alabama Code has required that juries must consider whether a defendant charged with murder is guilty of first-degree murder or of the lesser offense of second-degree murder.[39]

Moreover, it was well-settled that a principal purpose of this law was to protect the defendant's rights to have the jury make appropriate fact-findings based on the evidence. Thus, in a first-degree murder case where the

[39]This statute provided: "When the jury finds the defendant guilty under an indictment for murder, they must ascertain by their verdict whether it is murder in the first or second degree; but if the defendant on arrangement confesses his guilt, the court must proceed to determine the degree of the crime, by the verdict of a jury, upon an examination of the testimony and pass sentence accordingly." Code (1852) §115; Code (1867) §3657; Code (1876) §4299; Code (1886) §3728; Code (1896) §4857; Code (1907) §7087; Code (1923) §4457; Code (1940) Tit. 14, §317; Code (1975) §13-1-73.



trial court refused to instruct the jury on second-degree murder, the Alabama Supreme Court held that it was "the mandatory duty of the court to instruct the jury orally as to the different and distinguishing elements of each degree of murder and further that it is error for the court to so instruct the jury as to take from it the right and duty to ascertain by its verdict whether the defendant was guilty of murder in the first or second degree." *Houlton v. State*, 254 Ala. 1, 48 So.2d 7, 8 (1950). And in *Jackson v. State*, 226 Ala. 72, 79, 145 So. 656 (1933), the Alabama Supreme Court held that the "refusal of the court to so instruct . . . is a charge on the effect of the evidence, and an invasion of the province of the jury."

In sum, the history of lesser-offense instructions in Alabama reveals that from at least the mid-nineteenth century until the enactment of the death penalty statute in 1975, all criminal defendants in Alabama had an opportunity to qualify for a lesser-included-offense instruction. Moreover, defendants charged with the crime of first-degree murder (a capital offense until *Furman*, and since 1975, an offense punishable by life imprisonment)[40] always received a lesser-offense instruction on the non-capital crime of second-degree murder. In such cases, it "was a duty from which the judge was without discretion to abstain." *Brown v. State*, 109 Ala. 70, 77, 20 So. 103 (1895). Since 1975, all non-capital defendants—even those charged with first-degree murder—continued to have the same rights to a lesser-included offense. Thus, Alabama's decision to preclude lesser-offense verdicts in capital cases marks a radical

[40]§13-1-74, Code of Alabama (1975).

departure, not only from contemporary standards in Alabama, but also from Alabama's traditional approach to the trial of capital cases going back to the mid-nineteenth century.

### E. Lesser-offense instruction in the federal courts.

Since 1872, the lesser-offense procedure has been specifically authorized, first by federal statute and, since 1946, by Rule 31(c) Federal Rules of Criminal Procedure. The original lesser-offense statute was Section 9 of the Act of June 1, 1872, "An Act to further the Administration of Justice."[41] *See Berra v. United States,* 351 U.S. 131, 134-35, n.6 (1956).

With the adoption of the Federal Rules of Criminal Procedure, this statutory provision was transferred to Rule 31(c), which from its adoption until the present date provides:

> "*Conviction of less offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit

---

[41] 17 Stat. 196. This statute provided:

> "That in all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged: *Provided*, that each attempt be itself a separate offense."

This provision was maintained in Section 1035 of the Revised Statutes of the United States. Stevenson v. United States, 162 U.S. 313, 315 (1896); *see also* Historical Note to Fed. R. Crim. Proc. 31(c).



> either the offense charged or an offense necessarily included therein if the attempt is an offense."

According to the Notes of the Advisory Committee on Rules of Criminal Procedure, 29 (1945), this rule was designed as "a restatement of existing law."

In the late-nineteenth century, this Court emphasized the overriding importance of lesser-offense instructions as a procedural safeguard in criminal trials on at least three occasions. *Hopt v. Utah, supra; Wallace v. United States, supra; Stevenson v. United States, supra; see also Winston v. United States,* 172 U.S. 303, 312 (1899).

In *Stevenson,* the Court applied the statutory predecessor of Rule 31(c) and reversed a conviction for first-degree murder and a death sentence on the ground that the trial judge had erroneously refused to give a lesser-offense instruction on the crime of manslaughter. The Court held that where there was "some evidence" supporting a conviction of manslaughter rather than the charged offense of murder, it was error to refuse the lesser-offense instruction. *Id.* at 314. The Court stressed that for the judge to refuse instructions in such circumstances jeopardizes defendant's right to have the jury properly find the facts:

> "Whether the witnesses told the truth in regard to such circumstances [relating to the killing] is not for the Court to say nor is it for the Court to decide on the weight to be given to them if proper for the consideration of the jury." *Id.* at 322.
>
> * * *
>
> "A judge may be entirely satisfied from the whole evidence in the case that the person doing the killing was actuated by malice; that he was not in any such passion as to lower the grade of crime

> from murder to manslaughter by reason of any absence of malice; and yet if there be *any evidence* fairly tending to bear upon the issue of manslaughter, it is the province of the jury to determine from all the evidence what the condition of mind was, and to say whether the crime was murder or manslaughter." *Id.* at 323 (emphasis added).

Thus, *Stevenson* firmly establishes that where there is "any evidence" supporting a lesser-offense verdict, a jury instruction that precludes such a verdict seriously harms a defendant's right to a fair trial.

Between the decisions in *Stevenson* and *Keeble*, this Court has reaffirmed the importance of a defendant's right to a lesser-offense instruction. *Berra v. United States*, 351 U.S. 131, 134 (1956) ("In a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justified it, would no doubt be entitled to an instruction which would permit a finding of guilt of the lesser offense");[42] *Sansone v. United States*, 380 U.S. 343, 349-50 (1965).[43] Summarizing the rulings in *Sansone*, *Berra*, and *Stevenson*, the Court in *Keeble* reaffirmed that the lesser-offense option is a right to which a defendant is entitled if the evidence permits:

> "[I]t is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of a lesser offense and acquit him of the greater. The Federal Rules of Criminal Procedure deal with lesser included offenses, see Rule 31(c), and the defendant's right to such an instruction has been recognized in numerous decisions of this Court." 412 U.S. at 208 (footnote omitted).

Since *Keeble*, lower federal courts have held that failure to instruct the jury in the option of a lesser-offense verdict, where such an instruction is justified by the evidence, constitutes fundamental error sufficient to

---

[42]The Court held in *Berra* that where the lesser offense on which petitioner sought the instruction was established by facts which were identical with those required to prove the offense charged, 351 U.S. at 134, there was no requirement that the instruction be given. Even though the offense on which the petitioner desired a lesser-offense instruction in *Berra* had a lesser penalty than the offense charged, this difference did not justify an instruction, since under each statutory offense, "the factual issues to be submitted to the jury were the same," and when "the jury resolved those issues against petitioner, its function was exhausted, since there is here no statutory provision giving to the jury the right to determine the punishment to be imposed after the determination of guilt." 351 U.S. at 135.

[43]As in *Berra*, *Sansone* held that the defendant was not entitled to a lesser-offense instruction, since such an instruction "is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-offense." 380 U.S. at 350. Because the lesser offense on which defendant in *Sansone* sought an instruction "covers precisely the same ground" as the offense charged (which carried a greater penalty), *Sansone* held that no instruction was necessary. 380 U.S. at 352-54.

warrant collateral relief.[44]

**F. The weight of scholarly authority supports the availability of the lesser-offense instructions.**

Another factor on which this Court has frequently relied in deciding whether a procedure should be termed a "fundamental right" is the weight of scholarly authority. *E.g., Taylor v. Kentucky, supra,* 436 U.S. at 483-84. There is no question that the proposition that lesser-offense instructions should be available for criminal defendants has overwhelming support in the scholarly community.

Thus, Section 1.07(4)-(5) of the American Law Institute's Model Penal Code specifically provides for lesser-offense instructions where "there is a rational basis for a verdict acquitting the defendant of the

[44] *E.g.*, Joe v. United States, *supra*; United States ex rel. Powell v. Pennsylvania, *supra*; United States ex rel. Matthews v. Johnson, *supra*. Recognition that the lesser-offense option is a basic right accorded defendants for their protection is also shown by rulings denying a mutual right to the government. Thus a lesser-offense instruction requested by the prosecution may be denied where the offense on which the instruction is sought is not necessarily included within the offense charged (*i.e.*, some of the elements of the lesser offense may not be indispensable, necessary elements of the offense charged). In contrast, such instructions may be given at the request of the defendant where the facts of the case may warrant a jury verdict on the lesser rather than the charged offense. United States v. Whitaker, 447 F.2d 314 (D.C. Cir. 1971); United States v. Pino (No. 77-1599, 10th Cir., slip op. filed August 30, 1979, at 16-21). *Accord*, U.S. v. Stolarz, 550 F.2d 488, 492 (9th Cir.), *cert. denied*, 434 U.S. 959 (1977). In *Keeble*, the Court noted that the mutuality question was "a question that we need not now decide." 412 U.S. at 214.



offense charged and convicting him of the included offense." American Law Institute Model Penal Code §1.07(4)-(5) (Proposed Off. Draft 1962).[45] And numerous scholarly commentators have taken the position that lesser-offense verdicts where there is some evidentiary support for such a verdict is required as a matter of fundamental fairness in order to ensure that the jury can correlate the evidence to its decision on defendant's liability with optimal precision. *Comment, The Lesser Included Offense Doctrine in Iowa: The Gordian Knot Untied,* 59 IOWA L. REV. 684, n.5 (1974); Koenig, *The Many-Headed Hydra of Lesser-Included Offenses: A Herculean Task for the Michigan Courts.* 1 DETROIT COLLEGE OF LAW REVIEW 41, 52 (1975); *see also Comment, Jury Instructions on Lesser Included Of-*

[45] §1.07(4)-(5) provides in full:

"*(4) Conviction of Included Offense Permitted.* A defendant may be convicted of an offense included in an offense charged in the indictment [or the information]. An offense is so included when:

(a) it is established by proof the same or less than all the facts required to establish the commission of the offense charged; or

(b) it consists of an attempt or solicitation to commit an offense otherwise included therein; or

(c) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

*(5) Submission of Included Offense to Jury.* The Court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense."

For an explanation and discussion of the A.L.I. proposal, *see* the comments to §1.08 of the Model Penal Code (5th Tentative Draft 1956), at 40-43.

*fenses*, 57 NW. U. L. REV. 62, 68 (1962); *Recent Developments in The Criminal Law. The Included Offense Doctrine in California*, 10 U.C.L.A. L. REV. 870, 905 (1963); *Comment, Charging Lesser-Included Offenses in Ohio*, 14 W. RES. L. REV. 799, 811 (1963).

* * *

Thus, the lesser-offense option is a long-standing procedural device for the protection of defendants' rights and for the promotion of accurate fact-finding by criminal juries. The lesser-offense doctrine is a basic element of our criminal justice system, serving the valuable function of implementing the presumption of innocence and the beyond-a-reasonable-doubt standard. To single out capital defendants in one state for deprivation of an opportunity to receive a lesser-offense verdict is unfaithful to, and an unnecessary rejection of, the doctrine's long-standing acceptance for use in capital and non-capital cases. Alabama's selective withdrawal of the lesser-offense procedure is directed at the precise group of defendants who need its protection the most. Accordingly, this Court should hold that deprivation of the opportunity to obtain a lesser-offense verdict in a capital case violates the Due Process Clause.

## II.

## ALABAMA'S DEATH PENALTY LAW VIOLATES THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE AND THE DUE PROCESS CLAUSE BECAUSE IT IS INCONSISTENT WITH THE PRINCIPLES ESTABLISHED IN THIS COURT'S POST-*FURMAN* CAPITAL PUNISHMENT DECISIONS.

For many of the same reasons that Alabama's death penalty statute fails to satisfy Due Process require-



ments, the statute also violates the Cruel and Unusual Punishment Clause of the Eighth Amendment.[46] The

---

[46]Robinson v. California, 370 U.S. 660 (1962), which held that the requirements of the Cruel and Unusual Punishment Clause are applicable to the states pursuant to the Fourteenth Amendment's Due Process Clause, also established that the requirements of the Cruel and Unusual Punishment Clause apply not merely to the sentencing process, but also to the guilt-finding process.

In its 1976 Eighth Amendment rulings, the Court recognized that for purposes of deciding whether a particular capital punishment procedure violated the Eighth Amendment, consideration of the guilt-finding process was often necessary. Thus, in Jurek v. Texas, 428 U.S. 262 (1976), the Court specifically acknowledged the necessary interrelationship between the guilt-finding and sentencing processes. There, the plurality opinion noted with approval that Texas "requires that the jury find the existence of a statutory aggravating circumstance" at "the guilt determining stage." 428 U.S. at 270. And in Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977), Justice Blackmun stated that "it is possible that a state statute that required the jury to consider, during the guilt phase of the trial . . . relevant mitigating circumstances would pass the plurality's test." *Id.* at 641 (Blackmun, J., dissenting). And Mr. Justice Rehnquist stated in his discussion of the Eighth Amendment in his *Woodson* dissent: "One of the principal reasons why death is different is because it is irreversible; an executed defendant cannot be brought back to life. This aspect of the difference between death and other penalties would undoubtedly support statutory provisions for *especially careful review of the fairness of the trial, the accuracy of the fact-finding process*, and the fairness of the sentencing procedure where the death penalty is imposed." 428 U.S. at 323 (emphasis added). In addition, the irreversibility of the death penalty, considered in light of the Eighth Amendment, has resulted in stricter standards under the Due Process Clause, both for the guilt-finding process, *e.g.*, Reid v. Covert, *supra*, and for the sentencing process, *e.g.*, Gardner v. Florida, 430 U.S. 349 (1977); Witherspoon v. Illinois, *supra*.

statute stands alone in denying Alabama capital defendants protection that has historically been extended to such defendants and is currently the practice of every state in the union, the federal courts and Great Britain. Accordingly, there is a compelling basis for holding that the law fails to reflect "contemporary community values" and "evolving standards of decency," as the Eighth Amendment requires. *E.g., Woodson v. North Carolina, supra,* 428 U.S. at 295, 301; *see also Coker v. Georgia,* 433 U.S. 584, 595-96 (1977) (holding unconstitutional the death penalty in cases involving rape of adult women and emphasizing that Georgia "is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman"). In *Woodson,* the Court made it clear that the historical background and evaluation of a particular procedure were key factors in determining whether the procedure satisfied the "evolving standards of decency" test. 428 U.S. at 288 ("indicia of societal values identified in prior opinions include history and traditional usage"). *Woodson* also noted that "legislative enactments" in response to the Court's *Furman* decision and the degree to which most states had adopted a particular procedure were key factors in determining whether a particular procedure violated the Eighth Amendment. *Ibid. Accord, Gregg v. Georgia,* 428 U.S. 153, 179-81 (1976).

Because the Alabama statute not only diminishes the reliability of fact-finding on the issue of guilt or innocence but also jeopardizes the reliability of sentencing determinations in capital cases, it fails to meet the Eighth Amendment requirement established in



*Woodson* that there is a greater need for "reliability" in capital proceedings than in non-capital cases. Thus, the statute necessarily affects the sentencing process as well as the guilt-finding process, since a finding of guilt necessarily supplies an "aggravating circumstance" sufficient at the trial judge's sentencing stage to support a death sentence. By precluding lesser-offense verdicts, Alabama's law unjustifiably diverts capital juries' attention from the need to focus carefully on "the circumstances of the particular offense," as required by *Woodson,* 428 U.S. at 304, and *Lockett v. Ohio,* 438 U.S. 586, 604 (1978). *See* Point I, *supra.*

The overwhelming conviction and death sentence rate under Alabama's law proves that the law has created the "substantial risk" of "arbitrary and capricious" infliction of the death penalty which this Court has consistently warned against. *E.g., Gregg v. Georgia, supra,* 428 U.S. at 188; *Lockett v. Ohio, supra,* 438 U.S. at 601. There is just as much arbitrariness in a procedure that leads to an excessive number of convictions and death sentences as there is in a procedure that leads to so few death sentences that it is "wanton" or "freakish". *Furman v. Georgia,* 408 U.S. 238, 309, 310 (1972) (Stewart, J. concurring). As the Court made clear in *Lockett,* a capital punishment statute which precludes sufficient consideration of "circumstances of the offense proffered in mitigation" (here the probability that petitioner was guilty of only a serious, non-capital offense) creates an unacceptable "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." 438 U.S. at 605. Alabama's law creates this precise risk and its actual operation confirms that this risk has led to the result deemed "unacceptable" in *Lockett.*

**A. Alabama's law is a constitutionally invalid response to the Court's ruling in *Furman*.**

In the last analysis, Alabama's law is an erroneous and constitutionally intolerable response to this Court's decision in *Furman*. As noted in *Lockett*, while *Furman* made it clear that "unguided and unrestrained discretion regarding the imposition of the death penalty in a particular capital case" was constitutionally invalid, 438 U.S. at 598, "the variety of opinions supporting the judgment in *Furman* engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment." *Id.* at 599. In *Furman* itself, Chief Justice Burger (the author of the principal opinion in *Lockett*) predicted in his dissent that difficulties in assessing the lessons of *Furman* would lead some states to overreact in a fashion identical to Alabama:

> "But even assuming that suitable guidelines can be established, there is no assurance that sentencing patterns will change so long as juries are possessed of the power . . . to bring in a verdict of guilt on a charge carrying a lesser sentence; juries have not been inhibited in the exercise of those powers in the past . . .
>
> "Real change could clearly be brought about if legislatures provided mandatory death sentences in such a way as to deny juries the opportunity to bring in a verdict on a lesser charge; under such a system, the death sentence could only be avoided by a verdict of acquittal. If this is the only alternative that the legislatures can safely pursue under today's ruling, I would have preferred that the Court opt for total abolition." 408 U.S. at 401 (Burger, C.J., dissenting).



Following *Furman*, as Chief Justice Burger predicted, some states "responded to what was thought to be the command of *Furman* by adopting mandatory death penalties for a limited category of specific crimes, thus eliminating discretion from the sentencing process in capital cases." *Lockett v. Ohio, supra,* 438 U.S. at 599-600. These statutes were invalidated in *Woodson* and *Roberts (Stanislaus) v. Louisiana,* 428 U.S. 325 (1976), because they removed so much discretion from the trier of fact that they threatened the "reliability" of the capital punishment process and departed "markedly" from "evolving standards of decency" and "contemporary standards respecting the imposition of the punishment of death." *Woodson v. North Carolina, supra,* 428 U.S. at 301, 304-05.

Alabama also responded, as Chief Justice Burger feared in *Furman*, by abolishing the jury's capacity to tailor its findings to the facts with a verdict on a lesser charge. This response too is unconstitutional. Contrary to the requirements set forth in *Woodson*, the Alabama statute jeopardizes the ability of juries and sentencing judges to make reliable findings of fact in capital cases and is an aberration from well-established historical and contemporary procedural standards. No less than the statutes invalidated in *Woodson* and *Roberts*, Alabama's absolute preclusion of a lesser-offense verdict in capital cases fails "to provide a constitutionally tolerable response to *Furman's* rejection of unbridled jury discretion." *Id.* at 302.

Any doubt as to the invalidity of Alabama's approach to the problem of discretion in capital punishment is dispelled by the Court's ruling in *Gregg v. Georgia, supra.* There, the petitioner argued that

Georgia's procedures for capital punishment were inconsistent with *Furman* because they permitted the jury "to convict a defendant of a lesser included offense rather than find him guilty of a crime punishable by death. . . ." *Id.* at 199. The plurality opinion in *Gregg* rejected this argument. *Gregg* flatly stated that a system for the imposition of capital punishment which, among other things, precluded lesser-offense verdicts "would be totally alien to our notions of criminal justice" and "would be unconstitutional" since they "in many respects would have the vices of the mandatory death penalty statutes we hold unconstitutional today in *Woodson*. . . ." 428 U.S. at 199-200, n.50.

The actual results of Alabama's decision to preclude lesser-offense convictions in capital cases indicate that the law does not simply "approach the mandatory laws"[47] invalidated in *Woodson*, but has had even more draconian results than such statutes. Under a mandatory death sentencing statute, as the Court noted in *Woodson*, there is every reason to believe that many capital juries will "[q]uite frequently" refuse to convict on a capital offense "because of the enormity of the sentence automatically imposed." 428 U.S. at 302. Under Alabama's law, the statistical data indicate that capital juries convict far more readily than in ordinary cases and that death sentences occur with exponentially greater frequency than historic norms. *See Woodson v.*

[47]Jurek v. Texas, *supra*, 428 U.S. at 271. Moreover, unlike any of the statutes upheld in *Gregg, Jurek* and Proffitt v. Florida, 428 U.S. 242 (1976), Alabama's law completely precludes juries from "consider[ing] on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Ibid.*



*North Carolina*, 428 U.S. at 295, n.31 ("Data compiled in discretionary jury sentencing of persons convicted of capital murder reveal that the penalty of death is generally imposed in less than 20% of the cases").

The lesson of this Court's post-*Furman* cases, running from *Gregg* through *Lockett* is that death penalty statutes must grant the trier of fact neither too much nor too little discretion in deciding guilt or sentence for capital defendants.[48] In *Lockett*, this Court sought to provide the "clearest guidance" and "to reconcile previously differing views in order to provide that guidance." 438 U.S. 602. *Lockett* squarely held that a capital punishment process which fails to focus carefully on "the circumstances of the particular offense" cannot, as a matter of law, satisfy the special "reliability" requirements of the Eighth Amendment. Alabama's law clearly offends that basic principle by stripping capital juries of their long-established power to tailor their verdicts to the "particular offense" which the defendant committed. In an attempt to limit the jury's discretion, the law creates an intolerable risk of unreliable fact-finding at each stage of Alabama's capital punishment process.

[48]As Mr. Justice Marshall stated in his concurrence in *Lockett*: "Achieving the proper balance between clear guidelines that assure relative equality of treatment, and discretion to consider individual factors whose weight cannot always be preassigned, is no easy task in any sentencing system. Where life itself is what hangs in the balance, a find precision in the process must be insisted upon." 438 U.S. at 620.

**B. Alabama's law creates an undue risk that capital defendants such as petitioner will receive a sentence disproportionate to the seriousness of the crime.**

A direct consequence of Alabama's statute in cases such as petitioner's is that there is a substantial risk that capital juries will find defendants guilty of a capital crime even though there is considerable doubt whether the defendant had any purpose to kill the victim or to assist in his death. Precluding the jury from considering lesser offenses necessarily has the effect of diverting the jury's attention from the intent-to-kill element essential to the crime with which petitioner was charged. In order to avoid a decision to free petitioner in the face of a serious crime in which the victim was killed, the jury may well convict on the capital offense without carefully focusing in the intent-to-kill element which distinguishes the capital offense from lesser-included non-capital offenses of which it was not advised, such as felony murder. Thus, the statute encourages conviction of defendants who may not themselves have killed or intended to kill.[49]

---

[49]This situation was exacerbated in this case because the crime for which petitioner was convicted—"robbery or attempts thereof when the victim has intentionally been killed by the defendant"—has been construed to permit conviction of defendants who did not actually kill the defendant, but were mere accomplices or aiders and abetters of the person who actually perpetrated the killing. Ritter v. State, 375 So.2d 270 (Ala. 1979). Further confusion was engendered in petitioner's case when the trial judge gave the jury an aider-and-abetter and conspiracy instruction which did not focus clearly on the necessity for the jury to find that petitioner had the requisite intent to kill. *See* Statement of the Case, *supra*.



As a result of the distortion it creates, Alabama's statute is necessarily at odds with the Eighth Amendment rule endorsed in the plurality opinion in *Coker v. Georgia*, 433 U.S. 584, 592 (1977), that a punishment is unconstitutionally disproportionate if it "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or . . . is grossly out of proportion to the severity of the crime." The question whether capital punishment may be imposed without a clear-cut finding that the defendant "intended to take life" was expressly reserved in Chief Justice Burger's opinion in *Lockett*, 438 U.S. at 609, n.16, but answered in the negative in the *Lockett* concurrences of Mr. Justice White (438 U.S. at 624-28) and Mr. Justice Marshall (438 U.S. at 619-21).

Under Alabama's law and the trial judge's charge, petitioner's conviction and sentence of death may well turn "on fortuitous events that do not distinguish the intention or moral *culpability* of the defendant"[50] (*i.e.*, the unexpected knife assault on the victim in petitioner's presence by petitioner's robbery accomplice). The infliction of death upon petitioner where there is evidence that he may well have had "no intent to bring about the death of the victim" and where the jury was diverted from focusing on the intent element is "not only grossly out of proportion to the severity of the crime but also fails to contribute significantly to acceptable, or, indeed, any perceptible goals of punishment.[51] Accordingly, the operation of Alabama's death

---

[50]Lockett v. Ohio, *supra*, 438 U.S. at 620 (Marshall, J., concurring).

[51]*Id.* at 626 (White, J., concurring in the judgment).

penalty statute creates the grave possibility that a virtually unreviewable substantive violation of the excessive punishment doctrine will occur.

* * *

In sum, Alabama's law on its face, and as applied in this case, is contrary to the Eighth Amendment principles established by this Court in each of the major post-*Furman* Eighth Amendment cases.

## III.

## ALABAMA'S DEATH PENALTY STATUTE VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE IT SINGLES OUT CAPITAL DEFENDANTS FOR DEPRIVATION OF A WELL-ESTABLISHED PROCEDURAL RIGHT WHICH IT CONTINUES TO MAKE AVAILABLE IN NON-CAPITAL CASES.

By withdrawing from capital defendants the protection accorded by availability of a lesser-offense instruction and by continuing to make that instruction available in all non-capital cases, Alabama has established a discriminatory classification which also fails to comply with the Equal Protection Clause. Alabama's death penalty law singles out capital defendants for the deprivation of a right well established in Alabama law and one which remains available in Alabama non-capital cases. Because of the serious procedural disability which the Alabama law imposes on capital defendants and the lack of any supportable rationale for Alabama's discrimination between capital and non-capital defendants,



there is no basis for concluding, as this Court's Equal Protection decisions require, that Alabama's classification is either "reasonable" or has a "fair and substantial relation to the object of the legislation." *Reed v. Reed*, 404 U.S. 71, 75-76 (1971).

Alabama's law plainly jeopardizes what this Court has held are "fundamental rights" in "fairness of the fact-finding process" and the right to have a jury decide guilt or innocence without "an unacceptable risk . . . of impermissible factors coming into play." *Estelle v. Williams, supra,* 425 U.S. at 503, 504, 505. As noted in Point I, *supra*, this Court, as well as Alabama's own courts, has long recognized the critical importance in the jury trial process of the lesser-offense instruction. Moreover, as recognized in *Keeble*, absolute deprivation of lesser-offense instructions creates precisely the risk of fact-finding errors which were stressed in this Court's decisions in *Winship* and *Estelle*. In so doing, Alabama's law strikes at the core of capital defendants' "fundamental rights."

Because of the Alabama law's discrimination against Alabama capital defendants concerning their fundamental rights, this Court's applicable equal protection precedents require that Alabama's decision to single out capital defendants must be strictly scrutinized in order to determine whether it is "necessary to promote a compelling govermental interest." *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). *Accord, Zablocki v. Redhail*, 434 U.S. 374, 388 (1978); *Dunn v. Blumstein*, 405 U.S. 330, 338-43 (1972); *Lindsey v. Normet*, 405 U.S. 56, 73 (1972). Alabama's statute does not withstand

scrutiny under this standard.[52]

Alabama has conceded that the preclusion of lesser-included offenses is not constitutionally required.[53] The only interest that the state has ever asserted in support of its statutory discrimination against capital defendants is that it "is the most effective means of insuring that de facto jury discretion does not make the operation of a death penalty statute" inconsistent with this Court's ruling in *Furman* and that it "serves important constitutional goals."[54] Alabama has never suggested the desirability or even rationality of taking this extreme step in non-capital cases.

The decision to preclude lesser-offense instructions is neither a "necessary" nor appropriate means to promote Alabama's objective of serving the constitutional goals established in the *Furman* opinions. In *Gregg* and its companion cases, this Court flatly held that the concerns expressed in the *Furman* opinions regarding wanton, freakish, or effectively discriminatory capital

[52]Another reason for applying the strict standard of equal protection review is that Alabama's law singles out a group—capital defendants—which may be appropriately regarded as a "discrete and insular minority" lacking, due to their "special condition," the inability to readily invoke the "political processes ordinarily to be relied upon to protect minorities." United States v. Carolene Products Co., 304 U.S. 144, 152-53, n.4 (1938). Where legislation singles out such a minority, "strict" scrutiny is ordinarily applied. *E.g.*, Graham v. Richardson, 403 U.S. 365 (1971).

[53]*See* Respondent's Brief in Opposition to Petition for Writ of Certiorari, Jacobs v. Alabama (U.S. October Term 1978, No. 78,5696), at 24.

[54]*Ibid.* at 27.



punishment schemes could be satisfied by statutes which permit juries to receive lesser-offense instructions on the issue of guilt. *Gregg v. Georgia*, 428 U.S. at 163, 199 (1976); *Proffitt v. Florida*, 428 U.S. 242, 254 (1976); *Jurek v. Texas*, 428 U.S. 262, 274 (1976). Indeed the *Gregg* plurality opinion of Justices Stewart, Powell and Stevens stated that a system for capital punishment which eliminated lesser-offense instructions would be "totally alien to our notions of criminal justice." 428 U.S. at 199-200, n.50. Thus, it is now obvious that *Furman* does not necessitate that the states must interfere with the jury's fact-finding by eliminating lesser-offense instructions on the issue of guilt.

In any event, in light of the widely recognized function that lesser-offense verdicts perform in eliminating the risk of fact-finding error by juries, it is equally obvious that there is no "compelling" government interest in the absolute preclusion of such instructions. Indeed, Alabama openly acknowledged this fact in 1977 by reenacting a lesser-included offense statute for non-capital cases.[55]

What is more, this Court's decisions in *Gregg, Proffitt* and *Jurek* firmly establish that there are less restrictive means available to meet Alabama's objective of having a capital sentencing structure which meets constitutional requirements. Neither Georgia, Florida, nor Texas (nor for that matter any other state) has abolished lesser-offense verdicts in capital cases, as their capital punishment provisions have been approved in principle by this Court. Thus, Alabama's law offends the well-established

[55]§13A-1-9, Alabama Code (1978). This new statute does not go into effect until 1980. §13A-1-7, Code of Alabama (1979 Supplement).

principle that statutes affecting constitutional rights "must be drawn with 'precision' " and must be " 'tailored' to serve their legitimate objectives." *Dunn v. Blumstein, supra,* 405 U.S. at 343. Where, as is plainly the case here, there are "other, reasonable ways to achieve [its] goals with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference. If it acts at all, it must choose "less drastic means." *Ibid. Accord, Zablocki v. Redhail, supra,* 434 U.S. at 388-90.[56]

In sum, Alabama's law constitutes a discriminatory classification wholly unnecessary to achieve either the constitutional objectives which this Court specified in *Furman* or any other significant penological or fact-finding objectives.

Even if this Court rejects the argument for "strict" equal protection review and applies a standard of equal protection review less strict than that set forth in the *Shapiro, Dunn,* and *Zablocki* line of cases, Alabama's

[56]Alabama's argument that preclusion of lesser-offense instructions is a laudable means of promoting more accurate jury's fact-finding on the issue of guilt, Respondent's Brief in Opposition to Petition for Writ of Certiorari, n.51, *supra,* at 25, applies at least as strongly to serious non-capital cases involving crimes such as first-degree murder which carry life sentences as to capital cases. Alabama's law is fatally "underinclusive" and thus fails to meet yet another requirement of this Court's cases which apply "a strict equal protection test." *E.g.*, Zablocki v. Redhail, *supra*, 434 U.S. at 390; Shapiro v. Thompson, *supra*, 394 U.S. at 635. Under the strict equal protection standard of review, where a statute sweeps too narrowly and does not affect numerous persons who are logically covered by its purported rationale, it must be invalidated. The decision to single out capital defendants is therefore invalid.



statutory decision to discriminate against capital defendants should still be invalidated. Where this Court does not apply the "strict" standard of review, the Equal Protection Clause nonetheless requires that the statutory classification must be "reasonable," and must have a "fair and substantial relation to the objective of the legislation." *Reed v. Reed, supra,* 404 U.S. at 75-76. In addition, the purpose of the legislation must be "legitimate and nonillusory." *McGinnis v. Royster,* 410 U.S. 263, 276 (1973).

Applying the less strict standard of review, this Court has frequently invalidated statutes which single out one category of criminal defendants for the deprivation of a significant procedural safeguard to which other defendants remain entitled. Thus, in *Mayer v. City of Chicago,* 404 U.S. 189 (1971), the Court held that making transcripts freely available to felony defendants for appeals—but not to non-felony defendants—was an "unreasoned distinction." *Id.* at 196. In finding a violation of the Equal Protection Clause, the Court rested its conclusion on the fact that the ability of a defendant to afford transcripts "bears no more relationship to his guilt or innocence in a non-felony than in a felony case." *Ibid.*[57] Applying that same reasoning here, the fact that capital defendants may be sentenced to death and non-capital defendants may not bears no relationship to the question of whether the elimination of procedural safeguards is appropriate on the question of guilt or innocence in a capital case. Indeed, as shown

[57]*See also* Griffin v. Illinois, 351 U.S. 12, 17-18 (1956), and cases cited in Mayer v. City of Chicago, *supra*, 404 U.S. at 193 n.4.

in Point I, this Court has consistently held that capital defendants require more, not less, procedural protection. *Accord, In re Brown*, 439 F.2d 47 (3d Cir. 1971) (holding that equal protection violated by law withholding absolute right of appeal from juvenile defendants while allowing appeals to all other criminal defendants); *Powers v. Schwartz*, 448 F. Supp. 54 (S.D. Fla. 1978), *vacated as moot*, 587 F.2d 783 (5th Cir. 1979) (holding equal protection violated by law absolutely denying bail to felony defendants charged with offenses punishable by life imprisonment or death while extending bail to other defendants).

Similarly, *Baxstrom v. Herold*, 383 U.S. 107 (1966), held that New York violated the Equal Protection Clause by withholding the right to jury trial from criminals confined in prison whom the state sought to commit to state mental institutions at the end of their prison terms while granting such rights to other persons whom the state sought to commit civilly. After making it clear that it was not applying the "strict" standard of review, the Court held that while it was reasonable to distinguish the criminally insane from the civilly insane for purposes of deciding what types of commitment treatment were appropriate, this distinction had "no relevance whatever in the context of the opportunity to show whether a person is mentally ill *at all*" (emphasis in original). 383 U.S. at 111. By a parity of reasoning, Alabama's statute must be declared invalid. Even if it is reasonable to distinguish among capital and non-capital defendants for purposes of sentencing, this distinction has no relevance in the context of the question of whether a capital defendant is guilty "*at all.*" The notion advanced by Alabama that it should be permitted to strip capital defendants of a procedural protection on the issue of guilt, which that state has repeatedly reaffirmed as fundamental to its criminal justice system, is at least as "untenable" as the classification invalidated in *Baxstrom*. 383 U.S. at 114.

In reliance on the *Baxstrom* ruling, the Court in *Jackson v. Indiana*, 406 U.S. 715 (1972), held that the Equal Protection Clause was violated by Indiana's more lenient standard for civil mental health commitment and more stringent standard of release for criminal defendants found incompetent to stand trial than for all other civil commitment defendants. *Jackson* stressed: "If criminal correction and imposition of sentence [as in *Baxstrom*] are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others, the mere filing of criminal charges surely cannot suffice." 406 U.S. at 724. Because Alabama's law deprives capital defendants of valuable procedural protection available to all others merely on the basis of the prosecutor's discretionary decision to file a capital, rather than a non-capital, charge, it has precisely the constitutional defect condemned in *Jackson*.[58]

[58] In Humphrey v. Cady, 405 U.S. 504, 512 (1972), this Court stated: "The equal protection claim would seem to be especially persuasive if . . . petitioner was deprived of a jury determination, or of other procedural protections, merely by the arbitrary decision of the State to seek his commitment under one statute rather than the other." This is precisely what occurs in Alabama. Were petitioner indicted for first-degree murder, he would certainly have received a lesser-offense instruction. Only because the prosecutor invoked the special capital punishment statute was petitioner deprived of the protection accorded by the lesser-offense option.

The fundamental defect in Alabama's recent withdrawal from capital defendants of the right to have juries consider a lesser-offense verdict is that it is based on an objective which fails to meet the test that it be "legitimate and non-illusory." *McGinnis v. Royster, supra,* 410 U.S. at 276. Rather, Alabama's death penalty "reform" is predicated on nothing more than a misreading of this Court's decision in *Furman*. Since *Furman* did not require the abolition of lesser-offense instructions in capital cases, as this Court expressly held in *Gregg*, the Alabama law is obviously based on an "illusory" premise. The fact that Alabama has steadfastly maintained the lesser-offense option for all felony defendants (including those charged with first-degree murder) also demonstrates that the objective of denying the right to capital defendants, whose very lives are at stake, is not legitimate. Indeed, it is unconscionable to consistently reaffirm the necessity for granting a procedural safeguard to all defendants, as Alabama has done, except those whose very lives are at stake. The utter irrationality of Alabama's selective withdrawal of the lesser-offense procedure is underscored by the extraordinary conviction and death sentence rate that has occurred during the operation of Alabama's new law. The conclusion is thus inescapable that Alabama's law subverts rather than promotes the objective of fair treatment of capital defendants and is a thoroughly irrational means of furthering the goals of its criminal justice system.

Accordingly, even if this Court does not reach the question of whether Alabama's law violates the Due Process Clause of the Fourteenth Amendment or the Cruel and Unusual Punishment Clause of the Eighth Amendment, there are compelling grounds for holding that the law violates the Equal Protection Clause. By so



holding, this Court would merely reaffirm the well-established principle that capital defendants must be given at least the same procedural protection as non-capital defendants.

## IV.

## THE EVIDENCE WOULD HAVE SUPPORTED A VERDICT OF GUILT ON A LESSER-INCLUDED NON-CAPITAL OFFENSE HAD THIS ALTERNATIVE NOT BEEN PRECLUDED BY ALABAMA'S DEATH PENALTY STATUTE.

Were it not for Alabama's statutory preclusion of lesser-offense instructions in capital cases, petitioner would have been entitled to such an instruction. At the very least, the trial court, if it had not been foreclosed by the death penalty statute, would have charged the jury on the lesser-included, non-capital offenses of first-degree murder (which does not require a finding that the defendant intended that the victim be killed), second-degree murder, and robbery.[59]

A jury may find a defendant guilty of any offense which is lesser than the offense charged and is necessarily included within the offense charged, under Ala-

[59]At the time of petitioner's trial in 1977, the offense of first-degree or felony murder was punishable by life imprisonment. §13-1-74, Code of Alabama (1975). The crime of second-degree murder was punishable by not less than 10 years. *Ibid.* The crime of robbery was punishable by not less than 10 years. §13-3-110, code of Alabama (1975). In 1977, Alabama revised its criminal code. This revision abolished the distinction in the 1975 code between first-degree and second-degree murder. §13A-6-2, Code of Alabama (1978), and further provided that the crime of murder where there was no capital charge was punishable for not less than 10 years. §13A-6-2(c). This revision also established three different degrees of the crime of robbery. §§13A-8-41 to 43, Code of Alabama (1978). These revisions are not effective until 1980. §13A-1-7, Code of Alabama (1979 Supplement).

bama's statute applicable in non-capital cases.[60] The Alabama courts have held that a defendant accused of the "greater offense is entitled to have the court charge on the lesser offenses included in the indictment if

---

[60]Alabama's lesser-offense statutory provision governing non-capital cases provides as follows: "When an indictment charges an offense of which there are different degrees, the jury may find the defendant not guilty of the degree charged and guilty of any degree inferior thereto or of an attempt to commit the offense charged; and the defendant may also be found guilty of any offense which is necessarily included in that with which he is charged whether it be a felony or a misdemeanor." §15-17-1, Code of Alabama (1975). This statute will be superseded in 1980, *see* §13A-1-7, Code of Alabama (1979 Supplement), by a provision on lesser-offense instructions almost identical to §1.07(4)-(5) of the Model Penal Code. Thus, §13A-1-9, Alabama Code (1978) provides:

> (a) A defendant may be convicted of an offense included in an offense charged. An offense is an included one if:
>
> (1) It is established by proof of the same or fewer than all the facts required to establish the commission of the offense charged; or
>
> (2) It consists of an attempt or solicitation to commit the offense charged or to commit a lesser included offense; or
>
> (3) It is specifically designated by statute as a lesser degree of the offense charged; or
>
> (4) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interests, or a lesser kind of culpability suffices to establish its commission.
>
> (b) The court shall not charge the jury with respect to an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense.



there is any reasonable theory from the evidence which would support" such a charge. *Fulghum v. State*, 277 So.2d 886, 890 (Ala. 1973). Only if there is "an entire absence of evidence" tending to show that the accused was guilty of the lesser rather than greater offense may the instruction be refused. *Davis v. State*, 19 So.2d 358, 360 (Ala. 1944). Thus, if there is "*any* evidence, however weak, insufficient, or doubtful in credibility" supporting the lesser-offense finding, the charge must be given. *Davis v. State*, 19 So.2d 356, 358 (Ct. App. Ala. 1944), and cases cited therein. In determinging what lesser offenses are included in the crime charged, Alabama courts ordinarily analyze the elements of that crime and determine whether the elements of any lesser offense are included therein.[61]

Application to petitioner's case of these standards demonstrates that lesser-offense instructions would have been plainly proper had the trial judge not been precluded by statute from giving them.

Thus, petitioner was charged with the capital crime of "robbery . . . when the victim is intentionally killed by the defendant." §13-11-2(a)(2). As held by the Alabama Supreme Court, the elements of this crime are (a) robbery; (b) the killing of the victim during the robbery; and (c) an intent on the part of the defendant to kill the victim. *Clements v. State*, 370 So.2d 723 (Ala. 1979); *Ritter v. State*, 375 So.2d 270 (Ala. 1979). The Alabama courts have especially stressed the importance of the intent-to-kill element of this capital crime,

---

[61]*E.g.*, Harrison v. State, 340 So.2d 849, 853 (Ala. Crim. App.), *cert. denied*, 340 So.2d 854 (Ala. 1976); Sharpe v. State, 340 So.2d 885, 887 (Ala. Crim. App.), *cert. denied*, 340 So.2d 889 (Ala. 1976).

holding that it is not sufficient merely to show that the defendant intended to carry out a robbery, or even that the defendant "should have known that there was a substantial possibility that someone would be killed." *Ritter v. State, supra,* 375 So.2d at 273-74.

Under Alabama law, felony murder would be a lesser-included offense in cases, such as this, where the defendant is charged with robbery-intentional killing. Felony murder is not a capital offense, and is classified as first-degree murder.[62] Felony murder contains each of the elements of the crime of robbery-intentional killing with which petitioner was charged except for the intent-to-kill element. *E.g., Hardley v. State,* 202 Ala. 24, 79 So. 363 (1918). Thus, in a felony murder case involving a robbery, while the state must establish that the defendant was guilty of robbery and that a homicide occurred during the robbery, it does not have to show (as it did in petitioner's capital case) that the defendant "should have contemplated, intended, or willed the death of the victim." *Ritter v. State, supra,*

[62]Alabama's first-degree murder statute applicable to petitioner's crime provides that "murder in the first degree" includes homicides "committed in the perpetration of, or the attempt to perpetrate, any arson, rape, robbery or burglary. . . ." §13-1-70, Code of Alabama (1975). The Alabama courts have thus held that "in this state felony-murder is statutorily classified as murder." Ritter v. State, *supra*, 375 So.2d at 274. *Accord*, Garrett v. State, 369 So.2d 833, 837 (Ala. 1979) ("felony murder . . . is included in the statutory definition of murder in the first degree").



375 So.2d at 273, and cases cited therein.[63] All that need be shown for the crime of felony murder involving robbery is that the defendant intended to commit "an inherently dangerous felony—one in which he should have known that there was a substantial possibility that someone would be killed." *Ibid.* That felony murder is a lesser-included offense to the capital crime of robbery-intentional killing is confirmed by the death penalty statute itself, which provides:

> "Evidence of intent under this section shall not be supplied by the felony-murder doctrine." §13-11-2(b).[64]

The evidence at petitioner's trial amply supported a charge on the lesser offense of felony murder. Although petitioner admitted his participation in the robbery and that his accomplice fatally attacked the victim during the robbery, he vigorously denied that he either killed the victim or that he contemplated intended, or willed the victim's death. Indeed, petitioner testified that his accomplice's knife assault on the victim occurred

[63]The Alabama courts, in construing the capital offense of "robbery . . . when the victim is intentionally killed by the defendant" have also held that it is not necessary to show that the defendant personally killed the victim. Thus, the Alabama Supreme Court has held that an accomplice may be found guilty of this capital offense if the jury concludes that the defendant "has sanctioned and facilitated the crime so that his culpability [for intentional killing] is comparable to that of the principal." Ritter v. State, *supra*, 375 So.2d at 274. Even in the case where the defendant did not actually kill the victim (as petitioner testified here), the State must still show that he had "the particularized intent" that the victim be killed. *Id.* at 274.

[64]*See* Evans v. State, 361 So.2d 666, 667 (Ala. 1978), *cert. denied*, 440 U.S. 930 (1979).

unexpectedly and that he protested as soon as he saw what his accomplice had done. Thus, there was more than the requisite "slight" evidence that the element of intent-to-kill was absent and that petitioner was guilty of no more than felony murder. Accordingly, a charge on the non-capital offense of felony murder would have been proper had the trial judge not been precluded from giving such an instruction. *E.g., Davis v. State, supra,* 19 So.2d at 358.

Apart from the offense of first-degree or felony murder, petitioner also would have been entitled to a charge of the additional lesser offense of second-degree murder. The Alabama courts have held that in cases where the jury is instructed on the crime of first-degree murder (which, as noted above, includes felony murder), it must also be instructed on the crime of second-degree murder. *E.g., Jackson v. State,* 226 Ala. 72, 145 So. 656 (Ala. 1933). *See also Houlton v. State,* 254 Ala. 1, 48 So.2d 7 (Ala. 1950).[65]

Finally, petitioner qualified for an instruction on the lesser offense of robbery alone. Robbery is an indispensable, necessary element of the capital crime with which petitioner was charged. *Clements v. State, supra;*

---

[65]Second-degree murder has been defined by the Alabama courts as the unlawful killing of a human being with malice, but without deliberation or premeditation. *E.g.*, Harris v. State, 56 Ala. App. 301, 321 So.2d 267 (Ala. Crim. App. 1975). Moreover, §13-1-73, Alabama Code (1975), in effect for crime committed on the date of petitioner's offense provides in pertinent part:

> "When the jury finds the defendant guilty under an indictment for murder, they must ascertain by their verdict whether it is murder in the first or second degree. . . "



*Ritter v. State, supra,* 375 So.2d at 275. There is evidence to support a conclusion that petitioner was guilty only of robbery and not of the greater offense of felony murder. As noted earlier, in a felony murder case involving robbery where the defendant himself did not kill or intend the death of the victim, the defendant may be found guilty only if the jury determines that the defendant intended to commit "an inherently dangerous felony—one in which he should have known that there was a substantial possibility that someone would be killed." *Ritter v. State, supra,* 375 So.2d at 273-74. There was no evidence that petitioner knew that his accomplice was armed. Moreover, petitioner testified that he had no prior knowledge that the victim would be killed and that he was shocked when his accomplice attacked the victim with a knife. Thus, there was certainly "some evidence" to support a jury conclusion that petitioner had no basis for knowing that there was a substantial possibility that someone would have been killed. The jury should have had an opportunity to find that defendant was not even guilty of felony murder, but only of robbery.[66]

In sum, there is no question that the evidence would have supported a lesser-offense instruction under applicable Alabama law were it not for the death penalty statute's absolute preclusion of such an instruction.

---

[66]Under Alabama common law applicable to offenses (such as petitioner's) occurring before May, 1978, the elements of the offense of robbery are (a) the unconsented taking of the property of another, (b) from his person or his presence, (c) by violence or by putting in fear and (d) with a larcenous intent. *E.g.*, Martin v. State, 51 Ala. App. 405, 286 So.2d 80 (Ala. Crim. App. 1973).

## CONCLUSION

For the reasons stated herein, the judgment of the Supreme Court of Alabama affirming petitioner's conviction and sentence of death should be reversed.

Respectfully submitted,

DAVID KLINGSBERG
425 Park Avenue
New York, New York 10022
Tel. (212) 759-8400
*Attorney for Petitioner*

*Of Counsel*:
JOHN A. HERFORT
JAY WISHINGRAD
Kaye, Scholer, Fierman,
Hays & Handler
425 Park Avenue
New York, New York 10022
Tel. (212) 759-8400

JOHN L. CARROLL
Southern Poverty Law Center
1001 South Hull Street
Montgomery, Alabama
Tel. (205) 264-0286



## APPENDIX A

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

2. THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

3. THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

Section 1 of the Fourteenth Amendment provides:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. THE ALABAMA DEATH PENALTY STATUTE:

Chapter 11 of title 13 of the Code of Alabama (1975), section 13-11-1 through section 13-11-9 provides:

§ 13-11-1. LIMITATION ON IMPOSITION OF DEATH PENALTY OR LIFE SENTENCE WITHOUT PAROLE.

Except in cases enumerated and described in section 13-11-2, neither a court nor a jury shall fix the punishment for the commission of treason, felony or other offenses at death, and the death penalty or a life sentence without parole shall be fixed as punishment only in the cases and in the manner herein enumerated and described in section 13-11-2. In all cases where no aggravated circumstances enumerated in section 13-11-2 are expressly averred in the indictment, the trial shall proceed as now provided by law, except that the death penalty or life imprisonment without parole shall not be given, and the indictment shall include all lesser offenses. (Acts 1975, No. 213, § 1.)

## § 13-11-2. AGGRAVATED OFFENSES FOR WHICH DEATH PENALTY TO BE IMPOSED; FELONY-MURDER DOCTRINE NOT TO BE USED TO SUPPLY INTENT; DISCHARGE OF DEFENDANT UPON FINDING OF NOT GUILTY; MISTRIALS; REINDICTMENT AFTER MISTRIAL.

(a) If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses:

(1) Kidnapping for ransom or attempts thereof, when the victim is intentionally killed by the defendant;

(2) Robbery or attempts thereof when the victim is intentionally killed by the defendant;

(3) Rape when the victim is intentionally killed by the defendant; carnal knowledge of a girl under 12 years of age, or abuse of such girl in an attempt to have carnal knowledge, when the victim is intentionally killed by the defendant;

(4) Nightime burglary of an occupied dwelling when any of the occupants is intentionally killed by the defendant;

(5) The murder of any police officer, sheriff, deputy, state



trooper or peace officer of any kind, or prison or jail guard while such prison or jail guard is on duty or because of some official or job-related act or performance of such officer or guard;

(6) Any murder committed while the defendant is under sentence of life imprisonment;

(7) Murder in the first degree when the killing was done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;

(8) Indecent molestation of, or an attempt to indecently molest, a child under the age of 16 years, when the child victim is intentionally killed by the defendant;

(9) Willful setting off or exploding dynamite or other explosive under circumstances now punishable by section 13-2-60 or 13-2-61, when a person is intentionally killed by the defendant because of said explosion;

(10) Murder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts;

(11) Murder in the first degree where the victim is a public official or public figure and the murder stems from or is caused by or related to his official position, acts or capacity;

(12) Murder in the first degree committed while the defendant is engaged or participating in the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewman thereon, or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

(13) Any murder committed by a defendant who has been convicted of murder in the first or second degree in the 20 years preceding the crime; or

(14) Murder when perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand

jury proceeding against the defendant who kills or procures the killing of witness, or when perpetrated against any human being while intending to kill such witness.

(b) Evidence of intent under this section shall not be supplied by the felony-murder doctrine.

(c) In such cases, if the jury finds the defendant not guilty, the defendant must be discharged. The court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty, of not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the defendant may be tried again for the aggravated offense, or he may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance. If the defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as heretofore or hereafter provided by law; however, the punishment shall not be death or life imprisonment without parole. (Acts 1975, No. 213, § 2.)

### § 13-11-3. HEARING AS TO IMPOSITION OF DEATH PENALTY OR LIFE SENTENCE WITHOUT PAROLE AFTER CONVICTION; ADMISSIBILITY OF EVIDENCE; RIGHT OF STATE AND DEFENDANTS TO PRESENT ARGUMENTS.

If the jury finds the defendant guilty of one of the aggravated offenses listed in section 13-11-2 and fixes the punishment at death, the court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole. In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any



hearsay statements; provided further, that this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the state of Alabama. The state and the defendant, or his counsel, shall be permitted to present argument for or against the sentence of death. (Acts 1975, No. 213, § 3.)

### § 13-11-4. DETERMINATION OF SENTENCE BY COURT; COURT NOT BOUND BY PUNISHMENT FIXED BY JURY.

Notwithstanding the fixing of the punishment at death by the jury, the court, after weighing the aggravating and mitigating circumstances, may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole, which shall be served without parole; or the court, after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death. If the court imposes a sentence of death, it shall set forth in writing, as the basis for the sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include the following:

(1) One or more of the aggravating circumstances enumerated in section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence of death; and

(2) Any of the mitigating circumstances enumerated in section 13-11-7 which it finds insufficient to outweigh the aggravating circumstances. (Acts 1975, No. 213, § 4.)

### § 13-11-5. CONVICTION AND SENTENCE OF DEATH SUBJECT TO AUTOMATIC REVIEW.

The judgment of conviction and sentence of death shall be subject to automatic review as now required by law. (Acts 1975, No. 213, § 5.)

### § 13-11-6. AGGRAVATING CIRCUMSTANCES.

Aggravating circumstances shall be the following:

(1) The capital felony was committed by a person under sentence of imprisonment;

(2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(3) The defendant knowlingly created a great risk of death to many persons;

(4) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping for ransom;

(5) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital felony was committed for pecuniary gain;

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital felony was especially heinous, atrocious or cruel. (Acts 1975, No. 213, § 6.)

§ 13-11-7. MITIGATING CIRCUMSTANCES.

Mitigating circumstances shall be the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;



(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(7) The age of the defendant at the time of the crime. (Acts 1975, No. 213, § 7.)

§ 13-11-8. APPOINTMENT OF EXPERIENCED COUNSEL FOR INDIGENT DEFENDANTS.

Each person indicted for an offense punishable under the provision of this chapter who is not able to afford legal counsel must be provided with court appointed counsel having no less than five years' prior experience in the active practice of criminal law. (Acts 1975, No. 213, § 8.)

§ 13-11-9. EFFECTIVE DATE.

This chapter shall become effective on March 7, 1976. (Acts 1975, No. 213, § 10.)

5. THE ALABAMA LESSER INCLUDED OFFENSE STATUTE:

Section 15-17-1 of Chapter 17, title 15 of the Code of Alabama provides:

§ 15-17-1. VERDICT MAY BE FOR LESSER OFFENSE THAN CHARGED; VERDICT FOR OFFENSES INCLUDED IN OFFENSE CHARGED.

When an indictment charges an offense of which there are different degrees, the jury may find the defendant not guilty of the degree charged and guilty of any degree inferior thereto or of an attempt to commit the offense charged; and the defendant may also be found guilty of any offense which is necessarily included in that with which he is charged, whether it be a felony or a misdemeanor. (Code 1852, § 647; Code 1867, § 4199; Code 1876, § 4904; Code 1886, § 4482; Code 1896, § 5306; Code 1907, § 7315; Code 1923, § 8697; Code 1940, T. 15, § 323.)

6. THE ALABAMA STATUTE REQUIRING THE JURY TO FIND THE DEGREE OF MURDER:

Section 13-1-73 of Chapter 1, title 13 of the Code of Alabama provides:

§ 13-1-73. JURY TO FIND DEGREE.

When the jury finds the defendant guilty under an indictment for murder, they must ascertain by their verdict whether it is murder in the first or second degree; but if the defendant on arraignment confesses his guilt, the court must proceed to determine the degree of the crime, by the verdict of a jury, upon an examination of the testimony, and pass sentence accordingly. (Code 1852, § 115; Code 1867, § 3657; Code 1876, § 4299; Code 1886, § 3728; Code 1896, § 4857; Code 1907, § 7087; Code 1923, § 4457; Code 1940, T. 14, § 317.)



## APPENDIX B

The following is a compilation of statutes, rules of procedure and case law which establish that lesser offense instructions and lesser offense convictions are permitted in all fifty states and Puerto Rico.

**ALABAMA**

ALA. CODE § 13A-1-9(a) (1978) (formerly ALA. CODE § 13-9-3 and § 15-7-1 (1975)) provides that a defendant may be convicted of a lesser included offense. ALA. CODE § 13A-5-31(a) (1978) provides that capital offenses "shall not include any lesser offenses."

ALA. CODE § 13A-1-9(b) (1978) provides that the court "shall not" instruct on lesser offenses "unless there is a rational basis" for conviction of the lesser included offense.

*See, e.g., Harrison* v. *State,* 340 So.2d 849 (Ala. Crim. App.), *cert. denied,* 340 So.2d 854 (Ala. 1976).

**ALASKA**

ALASKA R. CR. P., Rule 31(c), ALASKA RULES OF COURT (1979) provides that the defendant may be convicted of a lesser included offense.

*See, e.g., Christie* v. *State,* 580 P.2d 310 (Alaska 1978).

**ARIZONA**

ARIZ. R. CR. P., Rule 23.3, ARIZ. RULES OF COURT (West, 1979) provides: "Forms of verdicts shall be submitted to the jury for all offenses necessarily included. . . . The defendant may not be found guilty of any offense for which no form of verdict has been submitted to the jury.").

*See, e.g., State* v. *Valencia,* 121 Ariz. 191, 589 P.2d 434 (1979).

**ARKANSAS**

ARK. STAT. ANN. § 41-105(2) (Supp. 1976) provides that the defendant may be convicted of a lesser included offense).

ARK. STAT. ANN. § 41-1301(2) (1975) provides: "If the defendant is found not guilty of the capital offense charged, but guilty of a lesser included offense. . . ."

ARK. STAT. ANN. § 41-105(3) (Supp. 1976) provides that the court shall not be obligated to instruct on lesser included offenses "unless there is a rational basis for . . . acquitting . . . of the offense charged and convicting . . . of the included offense."

*See, e.g., Westbrook* v. *State,* 580 S.W.2d 702 (Ark. 1979).

**CALIFORNIA**

CAL. PENAL CODE § 1159 (West 1970) provides that the defendant may be found guilty of a lesser included offense.

*See, e.g., People* v. *Preston,* 9 Cal.3d 308, 107 Cal. Rptr. 300, 508 P.2d 300 (1973).

**COLORADO**

COLO. REV. STAT. § 18-1-408(5) (1973) provides that the defendant may be convicted of a lesser included offense. *Accrod,* Colo. R. CR. P., R. 31(c) (1973).

*See, e.g., People* v. *White,* 553 P.2d 68 (Colo. 1976).

**CONNECTICUT**

CONN. GEN. STAT. ANN. § 53(a)-45(d) (West 1958) provides that a defendant charged with murder may be found "guilty of homicide in a lesser degree. . . ."

*See, e.g., State* v. *Brown,* 173 Conn. 254, 377 A.2d 268 (1977).

**DELAWARE**

DEL. CODE ANN. tit. 11, § 206(b) (1974) provides that the defendant may be convicted of a lesser included offense. *Accord,* DEL. CT. COMMON PLEAS CR. R., Rule 31(c) (1974).

DEL. CODE ANN. til. 11, § 206(c) (1974) provides that the court is not obligated to instruct on a lesser included offense unless there is a rational basis for conviction of only the lesser offense.

*See, e.g., Matthews* v. *State,* 310 A.2d 645 (Del. 1973).



. . . the possibility of a verdict of guilty of a lesser included offense" was "entirely inappropriate" 310 A.2d at 646).

**FLORIDA**

FLA. R. CR. P., Rule 3.510, FLA. STAT. ANN. (West 1973) provides that the jury may convict defendant of any offense necessarily included in any offense charged; "[t]he court shall charge the jury in this regard."

*See, e.g., State* v. *Terry,* 336 So.2d 65 (Fla. 1976).

**GEORGIA**

GA. CODE ANN. § 26-505 (1977) provides that the defendant may be convicted of a lesser included offense.

*See, e.g., Loury* v. *State,* 147 Ga. App. 152, 248 S.E.2d 291 (1978).

**HAWAII**

HAWAII REV. STAT. § 701-109(4) (1976) provides that defendant may be convicted of a lesser included offense.

HAWAII REV. STAT. § 701-109(5) (1976) provides that the court is not obligated to instruct on lesser included offenses unless there is a rational evidentiary basis for conviction of only the lesser offense.

*See, e.g., State* v. *Travis,* 45 Hawaii 435, 368 P.2d 883 (1962).

**IDAHO**

IDAHO CODE § 19-2312 (1979) provides that the defendant may be found guilty of any necessarily included offense.

*See, e.g., State* v. *Beason,* 95 Idaho 267, 506 P.2d 1340 (1973).

**ILLINOIS**

ILL. REV. STAT. ch. 38, § 2-9 (1973) defines included offense.

*See, e.g., People* v. *Simpson,* 57 Ill. App. 2d 442, 15 Ill. Dec. 463, 373 N.E.2d 809 (1978).

**INDIANA**

IND. CODE ANN. § 35-41-1-2 as amended by 1978 Ind. Acts,

P.L. 144, § 2, defines included offense.

IND. CODE ANN. § 35-1-35-1 (Burns 1975) provides that in its charge to the jury the court must state "all matters of law which are necessary for their information in giving their verdict").

*See, e.g., Pruitt* v. *State,* 382 N.E.2d 150 (Ind. 1978).

**IOWA**

IOWA CODE ANN. § 813.2, R. 21(3) (West, 1979) provides that the defendant may be convicted of a necessarily included offense. *Accord,* Iowa R. CR. P., R. 6(2), IOWA CODE ANN. (West, 1979).

IOWA R. CR. P., Rule 6(3), IOWA CODE ANN. (West, 1979) provides that the trial court has the duty to instruct on "all lesser offenses of which the accused might be found guilty . . . upon the evidence adduced," even if the instruction is not requested).

*See, e.g., State* v. *Rand,* 268 N.W.2d 642 (Iowa 1978).

**KANSAS**

KAN. STAT. ANN. § 21-3107(2) (1975) provides that the defendant may be convicted of an included crime.

KAN. STAT. ANN. § 21-3107(3) (1975) provides that the court has the duty to instruct on "all lesser crimes of which the accused might be found guilty . . . upon the evidence adduced, even though such instructions have not been requested or have been objected to."

*See, e.g., State* v. *Higdon,* 224 Kan. 720, 585 P.2d 1048 (1978) (the trial court has the affirmative duty to instruct on lesser included offenses, whether or not requested, if there is some evidence which would support conviction of the lesser offense; there is no such duty if the evidence excludes a theory of guilt on the lesser offense).

**KENTUCKY**

KY. REV. STAT. § 505.020(2) (1975) provides that the defendant may be convicted of any offense included in the offense charged. *Accord,* KY. TRIAL R., Rule 9.86, KY. REV. STAT. (1971).



*See, e.g., Martin* v. *Commonwealth,* 571 S.W.2d 613 (Ky. 1978).

**LOUISIANA**

LA. CODE CRIM. PRO. ANN. art. 814 (West Supp. 1979) defines "responsive verdicts" as including lesser offenses included in specific offenses.

LA. CODE CRIM. PRO. ANN. art. 815 (West, 1967) provides that a verdict of guilty of a lesser degree or lesser included offense is a responsive verdict for crimes not specifically provided for in article 814.

*See, e.g., State* v. *Martin,* 351 S.2d 92 (La. 1977).

**MAINE**

ME. REV. STAT. tit. 17-A, § 13A(2), (1979 Me. Legis. Serv. defines "lesser included offense").

ME. TRIAL R., Rule 31(c), ME. RULES OF COURT (West, 1979) provides that the defendant may be found guilty of a necessarily included offense.

ME. REV. STAT. tit. 17-A, § 13A(1), (1979 Me. Legis. Serv.) provides that the court shall instruct only on lesser included offenses supported by a rational evidentiary basis if so requested by either party or at the court's discretion. *See also* ME. REV. STAT. tit. 17-A, § 13A(3), (1979) Me. Legis. Serv.

*See, e.g., State* v. *Stoddard,* 289 A.2d 33 (Me. 1972).

**MARYLAND**

MD. R. P., Rule 757(b), MD. ANN. CODE (Supp. 1979), provides that "[t]he court may, and . . . [upon] request . . . shall, give . . . instructions . . . as correctly state the applicable law").

*See, e.g., Blackwell* v. *State,* 278 Md. 466, 365 A.2d 545 (1976),

*cert. denied,* 431 U.S. 918 (1977).

**MASSACHUSETTS**

MASS. GEN. LAWS ANN. ch. 278, § 12 (West, 1972) provides that the defendant may be convicted of the "residue" of a felony charged.

*See, e.g., Commonwealth* v. *Santo,* 376 N.E.2d 866 (Mass. 1978).

**MICHIGAN**

MICH. COMP. LAWS § 768.32 (Supp. 1979) provides that the defendant may be found guilty of attempt or a lesser degree of the offense charged except in the case of major controlled substances offenses identified by Mich. Comp. Laws § 335.341). [Section 335.341 has since been repealed, Mich. 1978 P.A. No. 368, § 25101, and has been replaced by new § 333.7403-.7404. (1978 Mich. Legis. Serv. (West).)]

MICH. COMP. LAWS § 768.29 (1968) provides that the court "shall instruct . . . as to the law applicable to the case," but failure so to instruct is not a ground for setting aside the judgment unless the defendant requested the instruction).

*See, e.g., People* v. *Drielick,* 56 Mich. App. 664, 224 N.W.2d 712 (1974), *aff'd,* 400 Mich. 559, 255 N.W.2d 619 (1977), *cert. denied,* 434 U.S. 1047 (1978).

**MINNESOTA**

MINN. STAT. ANN. § 609.04(1) (West Supp. 1979) provides that the defendant may be convicted of an included offense.

MINN. R. CR. P., Rule 26.03, subd. 18(5), MINN. RULES OF COURT (West, 1979) provides that instructions "shall state all matters of law which are necessary for the jury's information in rendering a verdict. . . .")

*See, e.g., State* v. *Merrill,* 274 N.W.2d 99 (Minn. 1978).

**MISSISSIPPI**

MISS. CODE ANN. § 99-19-5 (1972) provides that the jury



may find defendant guilty of a lesser included offense.

MISS. CODE ANN. § 99-17-20 (1972) provides that when the offense charged is punishable by death, the judge "may grant an instruction . . . as to [the jury's] discretion to convict the accused of the commission of an offense not specifically set forth in the indictment. . . ."

*See, e.g., Jackson* v. *State,* 337 So.2d 1242 (Miss. 1976).

**MISSOURI**

MO. ANN. STAT. § 556.046(1) (Vernon Spec. Pamphlet 1978) provides that the defendant may be convicted of a lesser included offense.

MO. ANN. STAT. § 556.046(2) (Vernon Spec. Pamphlet 1978) provides that the court is not obligated to instruct on included offenses "unless there is a basis for a verdict" convicting of only the lesser offense).

MO. ANN. STAT. § 565.006(1) (1979 Mo. Legis. Serv. (Vernon)) provides: "In each jury capital murder case, the court shall not give instructions on any lesser included offense which could not be supported by the evidence presented in the case."

*See, e.g., State* v. *Stone,* 571 S.W.2d 486 (Mo. App. 1978).

**MONTANA**

MONT. REV. CODES ANN. § 95-1915(3) (Supp. 1977) ("defendant may be found guilty of an offense necessarily included in the offense charged. . . .") *Accord,* MO. SUP. CT. R., Rule 27.01(c), MO. RULES OF COURT (West, 1979).

*See, e.g., State* v. *Ostwald,* 591 P.2d 646 (Mont. 1979).

**NEBRASKA**

NEB. REV. STAT. § 29-2025 (1975) provides for the conviction of lesser degrees of an offense than the degree charged, and for the conviction oa an attempt to commit an offense when the defenant is found not guilty of the offense but the attempt is an offense.

*See, e.g., State* v. *Hegwood,* 202 Neb. 379, 275 N.W.2d 605 (1979).

**NEVADA**

NEV. REV. STAT. § 175.501 (1977) provides that:

"The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

*See, e.g., Larsen* v. *State,* 93 Nev. 397, 566 P.2d 413 (1977).

**NEW HAMPSHIRE**

New Hampshire has neither a statute nor a rule on lesser included offenses. Its common law does permit instructions and convictions on lesser included offenses of the offense charged, if the evidence would justify a finding of guilt of the lesser offense.

*See, e.g., State* v. *Boone,* No. 78-274 (N.H. Aug. 17, 1979).

**NEW JERSEY**

N.J. STAT. ANN. § 2C:1-8(d) (West, 1979) provides that "A defendant may be convicted of an offense included in an offense charged whether or not the included offense is an indictable offense." Section 2C:1-8(e) permits the court to charge the jury with respect to the included offense only if there is "a rational basis for a verdict convicting the defendant of the included offense."

*See, e.g., State* v. *Saulnier,* 63 N.J. 199, 306 A.2d 67 (1973).

**NEW MEXICO**

N.M. R. CR. P., Rule 44(d), N.M. STAT. ANN. § 41-23-44 (Supp. 1975) provides as follows:

"If so instructed, the jury may find the defendant guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein.")

*See, e.g., State* v. *Aubrey,* 91 N.M. 1, 569 P.2d 411 (1977).



**NEW YORK**

N.Y. CRIM. PROC. LAW § 300.50(1) (McKinney, 1971) provides that the court may submit to the jury, in addition to the greatest offense which it is required to submit, any lesser included offense "if there is a reasonable view of the evidence which would support a finding that the defendant committed such lesser offense but did not commit the greater. If there is no reasonable view of the evidence which would support such a finding, the court may not submit such lesser offense." Section 300.50(2) provides that a failure to submit such a lesser included offense charge to the jury when the evidence would support it is not error if neither party requests such a charge.

*See, e.g., People* v. *Henderson,* 41 N.Y.2d 233, 391, N.Y.S.2d 563, 359 N.E.2d 1357 (1976).

**NORTH CAROLINA**

N.C. GEN. STAT. § 15-169 (1978) provides that in a trial for rape or any felony where the crime includes an assault, the defendant can be acquitted of the felony and convicted of the assault if the evidence warrants such a finding.

N.C. GEN. STAT. § 15-170 (1978) provides for the conviction of the crime charged in the indictment or of a lesser degree of the same crime or of attempt to commit that crime.

*See, e.g., State* v. *Drumgold,* 297 N.C. 267, 254 S.E.2d 531 (1979).

**NORTH DAKOTA**

N.D. R. CR. P., Rule 31(c), N.D. CENT. CODE (1974) provides that "The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

*See, e.g., State* v. *Piper,* 261 N.W.2d 650 (N.D. 1977).

**OHIO**

OHIO REV. CODE ANN. § 2945.74 (Baldwin, 1971) provides

that the jury can find the defendant guilty of attempts to commit the crime charged, or of lesser degrees, or of lesser included offenses of the crime charged.

*See, e.g., State* v. *Kilby,* 50 Ohio St.2d 21, 361 N.E.2d 1336 (1977).

**OKLAHOMA**

OKLA. STAT. ANN. tit. 22, § 916 (West, 1958) provides that "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense."

*See, e.g., Gilbreath* v. *State,* 555 P.2d 69 (Okla. Crim. App. 1976).

**OREGON**

OR. REV. STAT. § 136.460 (1977) provides for the conviction of a lesser degree of the crime charged or of an attempt to commit a lesser degree of the crime charged. Section 136.465 provides for the conviction of lesser included offenses of the crime charged.

*See, e.g., State* v. *Thayer,* 32 Or. App. 193, 573 P.2d 758 (Ct. App. 1978).

**PENNSYLVANIA**

Pennsylvania does not have a statute providing for instructions on lesser included offenses; its Rules of Criminal Procedure indirectly refer to lesser included offenses in Rules 1120(d) and 1120(e) (PA. STAT. ANN. (Purdon, 1979)). Rule 1120(d) provides that when a jury agrees on certain counts in the indictment which operate as an acquittal of lesser or greater included offenses to which they cannot agree, the lesser or greater included offenses shall be dismissed. Rule 1120(d) provides similarly.

*See, e.g., Commonwealth* v. *Terrell,* 482 Pa. 303, 393 A.2d 1117 (1978).

**PUERTO RICO**

P.R. R. CR. P., Rule 147, P.R. LAWS ANN. tit. 34 (1971)



provides that:

> "The defendant may be found guilty of any lesser offense the commission of which is necessarily included in that with which he is charged; or of a lesser offense than that with which he is charged; or of an attempt to commit either the offense charged or any offense the commission of which is necessarily included therein, or any degree thereof, if the attempt constitutes in itself, an offense."

**RHODE ISLAND**

R.I. GEN. LAWS § 12-17-14 (Supp. 1978) provides that the jury can find defendant guilty of a lower offense or of an attempt to commit the offense charged if it is not satisfied that defendant is guilty of the whole offense.

R.I. SUP. CT. R. P., Rule 31(c), and R.I. DIST. CT. R. P., Rule 31, R.I. GEN. LAWS (1976) both provide that a defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included in the offense charged.

*See, e.g., State* v. *Walsh,* 113 R.I. 118, A.2d 463 (1974).

**SOUTH CAROLINA**

South Carolina has neither a statute nor a rule of criminal procedure concerning lesser included offenses. Its common law permits an instruction on a lesser offense when there is evidence showing that the defendant was only guilty of the lesser offense.

*See, e.g., State* v. *Shea,* 226 S.C. 501, 85 S.E.2d 858 (1955); *State* v. *Mickle,* ____ S.C. ____, 254 S.E.2d 295 (1979).

**SOUTH DAKOTA**

S.D. CODIFIED LAWS ANN. § 23A-26-8 (Supp. 1978) (Rule 31(c), Rules of Criminal Procedure) provides that a defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit the offense charged or a necessarily included offense.

*See, e.g., State* v. *Grimes,* 237 N.W.2d 900 (S.D. 1976).

**TENNESSEE**

TENN. CODE ANN. § 40-2518 (1979) requires the judge without request to charge the jury as to the law of each offense included in the indictment in any prosecution for a felony where two or more grades or classes of offense may be included in the indictment.

TENN. R. CR. P., Rule 31(c), TENN. CODE ANN. (1979) provides that a defendant may be found guilty of an offense necessarily included in the offense charged, or of an attempt to commit the offense charged or a necessarily included offense.

*See, e.g., Howard* v. *State,* 578 S.W.2d 83 (Tenn. 1979).

**TEXAS**

TEX. CRIM. PRO. CODE ANN. Art. 37.08 (Vernon Cum. Supp. 1978) provides that the jury may find the defendant not guilty of a greater offense but guilty of any lesser included offense in a prosecution for an offense with lesser included offenses. Article 37.09 defines lesser included offenses.

*See, e.g., Day* v. *State,* 532 S.W.2d 302 (Tex. Crim. App. 1976).

**UTAH**

UTAH CODE ANN. § 76-1-402(3) (1978) provides that a defendant may be convicted of an offense included in the offense charged. Section 76-1-402(4) provides that the court is not obligated to charge the included offense "unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense."

UTAH CODE ANN. § 77-33-6 (1953) provides: "The jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment or information, or of an attempt to commit the offense."

*See, e.g., State* v. *Gillian,* 23 Utah 2d, 372, 463 p. 2d 811 (1970).



**VERMONT**

VT. R. CR. P., Rule 31(c), VT. STAT. ANN. (1974) provides for the conviction of offenses which are necessarily included in the offense charged, or conviction of attempts to commit the offense charged or an included offense.

*See, e.g., State* v. *Nicasio,* 136 Vt. 162, 385 A.2d 1096 (1978).

**VIRGINIA**

VA.CODE § 18.2-54 (1975) provides that:

> "On any indictment for maliciously shooting, stabbing, cutting or wounding a person or by any means causing him bodily injury, with intent to maim, disfigure, disable or kill him or of causing bodily injury by means of any acid, lye or other caustic substance or agent, the jury or the court trying the case without a jury may find the accused not guilty of the offense charged but guilty of unlawfully doing such act with the intent aforesaid, or of assault and battery if the evidence warrants."

VA. CODE § 19.2-285 (1975) provides that if a defendant is acquitted by the jury of part of the offense charged he can be sentenced for whatever part he is convicted of. § 19.2-286 provides that a defendant may be found not guilty of the felony charged but convicted of an attempt to commit that felony.

*See, e.g., Painter* v. *Commonwealth,* 210 Va. 360, 171 S.E.2d 166 (1969).

**WASHINGTON**

WASH. REV. CODE § 10.61.010 (1961) provides for the conviction of a lesser degree of the crime charged or of an attempt to commit the crime charged or an attempt to commit a lesser degree of the crime charged. Section 10.61.003 provides similarly. Section 10.61.006 provides that a defendant may be found guilty of an offense which is necessarily included within that with which he is charged.

*See, e.g., State* v. *Workman,* 90 Wash. 2d 443, 584 P.2d 382 (1978).

**WEST VIRGINIA**

W.VA. CODE § 62-3-15 (1977) provides that when a person is indicted for murder, the jury must decide whether he is guilty of first-degree or second-degree murder. Section 62-3-16 provides that:

> "On an indictment for felonious homicide, the jury may find the accused not guilty of a felony, but guilty of involuntary manslaughter. And on any indictment for maliciously shooting, stabbing, cutting, or wounding a person, or by any means causing him bodily injury, with intent to kill him, the jury may find the accused not guilty of the offense charged, but guilty of maliciously doing such act with intent to maim, disfigure, or disable, or of unlawfully doing it, with intent to maim, disfigure, disable, or kill, such person."

Section 62-3-18 provides that on an indictment for a felony, the jury may find the defendant not guilty of a felony, but guilty of an attempt to commit that felony.

*See, e.g., State* v. *Wayne,* _____ W. Va. _____ , 245 S.E.2d 838 (1978).

**WISCONSIN**

WIS. STAT. ANN. § 939.66 (West, 1958) provides for the conviction of either the crime charged or an included crime, but not both. Attempts are defined as included crimes.

*See, e.g., Leach* v. *State,* 83 Wis.2d 199, 265 N.W.2d 495 (1978).

**WYOMING**

WYO. CT. R., Rule 32(c), WYO. STAT. ANN. (1979) provides that the defendant may be found guilty of a necessarily included lesser offense or of an attempt to commit the offense charged or the lesser included offense.

*See, e.g., Jones* v. *State,* 580 P.2d 1150 (Wyo. 1978).



## APPENDIX C

## STATE DEATH PENALTY STATUTES

1. Code of Alabama, Title 13A, § 13A-5-31 *et seq.* (1977).
2. Arizona Revised Statutes, Title 13, § 13-902 (1973), as amended 1978.
3. Arkansas Statutes Annotated, Criminal Code, Chapter 13, § 41-1301 *et seq.* (1975), as amended 1977.
4. California Penal Code, Title 18 § 190.1 *et seq.* (1978).
5. Colorado Revised Statutes, Title 16, § 16-11-103 (1975).
6. General Statutes of Connecticut, Title 53a, § 53a-45 (1969), as amended 1973.
7. Delaware Code Annotated, Title 11, § 4209 (1953), as amended 1977.
8. Florida Statutes Annotated, Title 45 § 921.141 (1972), as amended 1978.
9. Code of Georgia Annotated, Title 27, § 27-2534.1 (1973).
10. General Laws of Idaho Annotated, Title 18, 18 § 4004 (1973), as amended 1977.
11. Illinois Revised Statutes, Chapter 38, § 9-1, (1961), as amended 1979.
12. Indiana Statutes Annotated, Title 35, §§ 35-50-2-3; 35-50-2-9 (1976), as amended 1977.
13. Kentucky Revised Statutes Annotated, Chapters 507.020 (1974), as amended 1976; 532.025 (1976).
14. Louisiana Revised Statutes Annotated, Code of Criminal Procedure, Article 905 *et seq.* (1976).
15. Annotated Code of Maryland, Article 27 § 413 (1951), as amended 1979.
16. Mississippi Code Annotated, Title 97, § 97-3-21 (1974), as amended 1977; Title 99, §§ 99-19-101 *et seq.* (1977).

17. Annotated Missouri Statutes, Title 38 §§ 565.008; 565.012 (1977).
18. Revised Code of Montana, Title 95, §§ 95-2206.6; 95-2206.7; 95-2206.8 (1977).
19. Revised Statutes of Nebraska, Article 25, §§ 29-2521; 29-2522; 29-2523 (1973).
20. Nevada Revised Statutes, Title 16, § 200.030 (1911), as amended 1977; §§ 200.033; 200.035 (1977).
21. New Hampshire Revised Statutes Annotated, Criminal Code, Chapter 630 (1971), as amended 1977.
22. New Mexico Statutes Annotated § 31-18-14 (1978).
23. New York Penal Law, § 60.06; 125.27(1)(a)(iii) only (1974). *See, People v. Davis* 43 N.Y. 2d 17 (1977).
24. General Statutes of North Carolina, Chapter 15, § 15A-2000 (1977).
25. Oklahoma Statutes Annotated, Title 21, § 701.9 *et seq.* (1976).
26. Oregon Revised Statutes, Chapter 163, § 163.003-163.145 (1978).
27. Pennsylvania Consolidated Statutes Annotated, Title 18 § 1311 (1972), as amended (1978).
28. Code of Laws of South Carolina, Title 16, § 16-3-20 (1977).
29. South Dakota Codified Laws, Chapter 22, § 22-6-1 (1877), as amended (1979); Chapter 23A, § 23A-27-1 (1877), as amended 1978.
30. Tennessee Code Annotated, Title 39, § 39-2402; 39-2404 (1858), as amended 1977.
31. Texas Code of Criminal Procedure, Chapter 37, § 37.071 (1973).
32. Utah Code Annotated, Title 76, § 76-3-207; 76-5-202 (1973), as amended 1975.



33. Revised Code of Washington Annotated, Title 9A, Article 1 (1977).
34. Wyoming Statutes Annotated, Title 6, §§ 6-4-101; 6-4-102; 6-4-103 (1977).